TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1911

No. [redacted] 85

THE UNITED STATES, APPELLANT,

vs.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, TRADING AS ELLICOTT MACHINE COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 8, 1909.

(21747)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 521.

THE UNITED STATES, APPELLANT,

vs.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, TRADING AS ELLICOTT MACHINE COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Exhibit No. 1.—Contract between The Isthmian Canal Commission and the Ellicott Machine Company, July 12, 1906.	13	8
Letter of Ellicott Machine Company to F. B. Maltby, division engineer, July 27, 1906	19	12
Letter of F. B. Maltby, division engineer, to D. W. Ross, general purchasing officer, June 26, 1906	20	13
Bond for fulfillment of contract	21	14
Advertisement for proposals	22	14
Specifications	24	16
Drawings	27 a,b	19
Traverse	28	19
Argument and submission	29	19
Findings of fact	30	19
Conclusion of law	33	22
Opinion by Atkinson, J	33	22
Judgment	37	26
Argument and submission of motion for new trial	38	26
Order overruling motion for new trial	38	26
Opinion by Atkinson, J., on motion for new trial	39	26
Argument and submission of motion to amend findings of fact	42	29
Order overruling in part and allowing in part motion to amend findings	42	29
Application for appeal	43	29
Order allowing appeal	43	29
Clerk's certificate	44	29

1 In the Court of Claims of the United States.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, TRADING AS ELLICOTT MACHINE COMPANY, CLAIMANT, *vs.* UNITED STATES. } No. 29907.

I. PETITION.—*Filed Dec. 10, 1906.*

To the Honorable the Justices of the Court of Claims:

The above-mentioned claimant respectfully represents:

I.

That the said Charles E. Ellicott and John B. Norris are copartners, trading under the firm name of Ellicott Machine Company, and that they both are citizens and residents of the State of Maryland, doing business in the city of Baltimore, and bring this suit in their own right as copartners of said Ellicott Machine Company, in respect to the matters hereinafter set forth.

2 II.

That the Isthmian Canal Commission (acting for the United States), being desirous of purchasing six steel dump barges, heretofore, to wit, some time in the month of April, 1906, circulated in due form a circular letter and advertisement asking for proposals for the erection and delivery of six steel dump barges; the bids on the same to be opened at the office of the general purchasing officer of the Isthmian Canal Commission at Washington, D. C., on April 27, 1906; that only one proposal was received at that time, and a new circular and advertisement was issued asking for sealed proposals for the erection and furnishing of six steel dump barges, said proposals to be opened on May 21, 1906, at the above-named office of the general purchasing officer in Washington, D. C.

III.

That under this second advertisement and circular two proposals were received and opened on May 21, 1906, one of the bidders being the Holland-American Dredge Building Syndicate, whose bid was thirty-five thousand dollars ($35,000) for each barge, delivered at Colon, Isthmus of Panama, and the other the bid of claimant, the Ellicott Machine Company, for one hundred and forty-eight thousand four hundred dollars ($148,400) for the six barges, delivered at Baltimore, Maryland.

IV.

That after these proposals had been duly considered they were laid aside and new proposals called for. This third lot of proposals was

asked for through advertisement and circular No. 310–C and specifications thereto annexed, copies of which circular No. 310–C
3 and specifications thereto attached are annexed to the contract, an original of which is filed herewith as "Claimant's Exhibit No. 1;" that this third lot of proposals was opened on June 8, 1906, in the said office of the general purchasing officer of the Isthmian Canal Commission at Washington, D. C. The bidders and bids were as follows:

William Cramp & Sons, Philadelphia	$31,500 each.
Ellicott Machine Company, Baltimore, Md	16,900 each.
Fore River Ship & Engine Building Company, Quincy, Mass	50,000 each.
Maryland Steel Company, Sparrow's Point, Md	27,950 each.
T. S. Marvel Ship Building Company, Newburgh, New York	26,000 each.
Motley, Green & Company, New York	22,750 Colon.
	20,750 Liverpool. (knocked down.)
Newport News Shipbuilding Company, Newport News, Va	149,000 for the lot.
William E. Winant, Brooklyn, New York	111,000 " " "

(This bid, however, was informal, no guarantee bond being attached.)

All these bids were mailed to F. B. Maltby, division engineer of the Isthmian Canal Commission at Cristobal, Isthmus of Panama, and claimant being the lowest bidder, the said F. B. Maltby, by letter of June 21, 1906, addressed to D. W. Ross, general purchasing agent of the Isthmian Canal Commission, Washington, D. C., and by second letter addressed to said D. W. Ross, of date of June 26, 1906, approved the awarding of the contract for the six steel dump barges to
4 claimant on its proposal of June 7, 1906, provided the arrangement of hinges and hoisting gear on the barges should be made in conformity with suggestions contained in said letter of June 26 and in a sketch which accompanied said letter.

V.

That the proposal, opened June 8, 1906, from claimant was made in due form, according to legal requirements and in conformity with the specifications and circular letter No. 310–C, with certain modifications as shown on schedule annexed to proposal, and as also shown on drawing No. 2105, dated June 7, 1906, a copy of said drawing and schedule being attached to and made part of the proposal.

VI.

That on July 15, 1906, claimant received letter from D. W. Ross, general purchasing agent of the Isthmian Canal Commission, enclosing contracts in triplicate to be executed by claimant and defendants, which contracts purported to provide for the erection and delivery of the six steel dump barges in accordance with the claimant's proposal opened June 8, 1906; but that claimant returned said contracts in triplicate on July 16, 1906, together with a letter of that date addressed to said D. W. Ross. Said letter reads in part as follows:

"We have your favor of June 14th, 1906, with enclosures as noted. In order to correspond with our proposal of June 7th, 1906, Article I should read as follows:

"Article I. That the said Ellicott Machine Company shall construct, erect and deliver to the Isthmian Canal Commission, at Baltimore, Maryland, six steel dump barges in accordance with specifications contained in circular No. 310-C of the Isthmian Canal Commission, dated May 29th, 1906; with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and subject to such amendments as to details of hinges, hoisting gear and method of securing timber lining to hoppers, as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract."

Said letter further says that "our drawing No. 2105 was not intended to show working details, but solely to limit the conditions of displacements, load, and draft. As long as these are maintained we shall be pleased to follow such reasonable design of working details in arrangement and distribution of material as Mr. Maltby or his inspector may require." And the letter further says, "We return contracts."

VII.

That thereupon, at the request of said D. W. Ross and F. B. Maltby, claimant wrote a letter, addressed to said F. B. Maltby, under date of July 27, 1906, a copy of which letter is annexed to the contract filed herewith as "Claimant's Exhibit No. 1," for the purpose of furnishing additional details called for in the letter of said F. B. Maltby of June 26, 1906, of hinges, hoisting gear, and method of securing timber lining to hoppers. Enclosed with such letter was a blueprint marked "No. 2105," copy of which blueprint is annexed to the contract herewith, filed as "Claimant's Exhibit No. 1."

VIII.

That said blueprint No. 2105 so inclosed was exactly similar to blueprint No. 2105, which was first filed with the bid of claimant June 7, 1906, except that said blueprint inclosed with letter of July 27 contained the following words written on the face thereof:

"*Schedule of displacement, load, and draft.*

Capacity of bins, cu. yds	350
Displacement of hull as shown on 8'-0" draft line, 21,446 cu. ft., at 65 lbs. per cu. ft	1,394,000
350 cu. yds., total load, at 3,240 lbs. per cu. yd	1,134,000
Net weight of barge, including equipment	260,000 lbs."

That the above results were shown by drawing No. 2105 as originally submitted, but were added specifically in figures on said drawing for the purpose of making more clear the total net weight of the barge, namely, 260,000 pounds.

IX.

That claimant's letter of July 27, inclosing said blueprint No. 2105, stated that the weight of the barges could be distributed in any way the representative of the Isthmian Canal Commission might desire. Said letter further said: "It has been the custom on previous similar contracts, the total weights and general design being clearly specified and defined in the contract, to get out the working details under the supervision of a representative of the contracting officer as soon as possible after the execution of the contract." A copy of this letter was also mailed to said D. W. Ross.

X.

That on August 8 claimant was informed, through message from D. W. Ross to claimant's representative in Washington, W. A. Pate, that cablegram had been received by said D. W. Ross from said F. B. Maltby, stating that contract with Ellicott Machine Company, in accordance with their letter of July 27 and drawing No. 2105,
7 would be satisfactory, and said D. W. Ross further informed said W. A. Pate that contract was being prepared in conformity therewith.

XI.

That on August 17, 1906, the contract which is annexed hereto as "Claimant's Exhibit No. 1," was delivered to claimant by said Isthmian Canal Commission and was signed by John B. Norris on behalf of claimant and returned on that day to said Isthmian Canal Commission; said contract, although in fact signed on August 17, bears date July 12, 1906; and that on August 28, 1906, a copy of said contract, duly executed by the said claimant and Theodore P. Shonts, chairman of said Isthmian Canal Commission, was sent to claimant by registered mail and received in due course; whereupon claimant immediately took steps to erect said six steel dump barges in accordance with the provisions of said contract, and made preparation for the due and proper performance thereof, and in so doing spent much valuable time and money.

XII.

Claimant avers that it is ready and willing to carry out said contract in strict accordance with the terms thereof and has at all times been ready and willing to so perform the same and has on numerous occasions so informed the defendant, its agents and employees; but that it has been prevented from so doing by the acts of the said

United States, its agents and employees, and has thereby suffered great pecuniary loss and damage.

XIII.

That said defendant, its agents and employees, have prevented claimant from performing said contract in numerous ways, and among others as follows:

8 That on August 30, 1906, claimant prepared an itemized list of materials covering the six barges and distributing the total weight of 260,000 pounds in the best possible manner, according to claimant's judgment; that this list of materials was sent by letter of August 30, 1906, to said D. W. Ross, and at the request of said D. W. Ross said list of materials was, on September 1, 1906, enclosed in a letter to T. M. Post, inspector of dredges for Isthmian Canal Commission; that claimant wrote again to said D. W. Ross on September 7, 1906, asking that some action be taken, as the loss of time was of vital importance to it; that, although claimant has made numerous attempts to get the said defendant, its proper agents and employees, to approve said list of materials, the said agents and employees have refused at all times to approve said list of materials, or to modify the same, or to submit to claimant any new list of material; and that on September 8 the said T. M. Post wrote a letter to claimant stating that he had been directed to withhold approval of the bill of materials, but that the same had been forwarded to said F. B. Maltby, and that a cable reply was expected from Mr. Maltby shortly; that claimant received no answer to its request that bill of material be approved, and wrote again to said D. W. Ross on September 14, asking what instructions concerning the contract had been received from Mr. Maltby, and claimant was thereupon advised that a cablegram had been received from F. B. Maltby, which read as follows:

"Insist Ellicott follow our specifications as to framing and plates on barges."

And that in answer to this information claimant wrote, under date of September 15, 1906, to said D. W. Ross, stating that it was willing to return to the original specifications as to framing and plates, but if this was insisted upon it would decrease the displacement to some extent, and consequently the carrying capacity of the barges;

9 otherwise the weight of the barges would exceed the total called for in the contract, namely, two hundred and sixty thousand (260,000) pounds.

Claimant further suggested in this letter that the original specifications as to framing and plates could be carried out and at the same time the same capacity, as shown on drawing No. 2105, maintained if the cost of the additional material was covered by a supplementary contract.

XIV.

That at the request of said D. W. Ross claimant then submitted a new drawing and a letter of October 1, estimating for a new barge according to original specifications, but not according to barges contracted for in claimant's contract with defendant.

XV.

Claimant further shows that the Isthmian Canal Commission has refused to carry out the said contract dated July 12, 1906; that it has refused to award claimant a new contract in accordance with letter of October 1, although claimant, in order to meet the wishes of the said defendant, its agents and employees, offered to cancel its present contract and enter into a new contract in accordance with drawing No. 2107 and claimant's letter of October 1, 1906; but that, on the contrary, said D. W. Ross showed claimant a cablegram from F. B. Maltby, requesting said D. W. Ross to award the contract for the said six barges to the Newport News Company on its original bid of one hundred and forty-nine thousand dollars ($149,000), and claimant is informed and believes that said Isthmian Canal Commission has now awarded to the Newport News Company the contract for the erection of the said six barges which defendant is under contract to buy from claimant.

10

XVI.

Claimant further avers that the said D. W. Ross has informed it that defendant would not receive the barges unless built according to original specifications; and claimant has also received a letter from T. P. Shonts, chairman of the Isthmian Canal Commission, dated October 5, 1906, stating that the United States is prepared to carry out the contract with claimant, provided barges are erected strictly in accordance with the detailed specifications made a part of and annexed to the contract, and claimant avers that this letter is tantamount to a refusal to accept the barges if built according to the contract dated July 12, 1906.

XVII.

That Article I of said contract provides as follows:

"That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310-C of the Isthmian Canal Commission, dated May 25th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter

of F. B. Maltby, division engineer, dated June 26th, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch are attached hereto and form a part of this contract."

And claimant avers that it is ready and willing and has at all
11 times been ready and willing to erect the barges in accordance with the provisions of this contract, and through its attorney, Francis K. Carey, by letter of October 26, 1906, has so notified defendant; but that said defendant, its agents and employees, have refused to accept the said six steel dump barges unless they are erected strictly in accordance with the "detailed specifications made part of and annexed to the contract;" and claimant avers that under the provisions of said contract it is not compelled to erect the six steel dump barges in strict accordance with the original detailed specifications, but in accordance with these specifications as modified by the said contract.

XVIII.

Claimant further shows that the difference between the cost to the claimant of building the barges in accordance with the terms of said contract and the amount of $91,400, which, by the terms thereof it was entitled to receive therefor, is the sum of $30,000; all of which gains and profits claimant has been wrongfully deprived of by the action of the defendant, its agents and employees, as hereinbefore set forth.

XIX.

Claimant avers that it is entitled to the moneys herein named, and that said amount is justly due and owing to it from the United States after allowing all just credits and setoffs; that no assignment or transfer of the claims hereinbefore set forth or any part thereof or any interest therein has been made by it to any one whomsoever or by any one in its behalf, and that the said John B. Norris and Charles E. Ellicott have at all times borne true allegiance to the United States.

12 Wherefore, the premises considered, claimant demands judgment against the United States in the sum of thirty thousand dollars ($30,000).

ELLICOTT MACHINE CO.,
Claimant.
CHARLES E. ELLICOTT.
JOHN B. NORRIS.

A. A. HOEHLING, JR.,
Attorney for Claimant.

Post-office address of claimant: Ellicott Machine Company, Bush and Severn streets, Baltimore, Md.

Post-office address of attorney for claimant: A. A. Hoehling, jr., 1416 F street, Washington, D. C.

STATE OF MARYLAND.

Baltimore City, to wit:

I hereby certify that before me, the subscriber, a notary public of the State of Maryland in and for Baltimore city aforesaid, personally appeared Charles E. Ellicott and John B. Norris, the copartners of the Ellicott Machine Company, and severally made oath in due form of law that the several matters and things set forth and contained in the foregoing petition by them subscribed are true as they verily believe.

Subscribed and sworn to before me this 30th day of November, nineteen hundred and six.

[L. S.] HOWARD D. ADAMS,
Notary Public.

13 EXHIBIT No. 1.

Contract drawn on Washington order, No. 3940, dated 7/12, 1906.

This agreement, entered into this 12th day of July, 1906, between the Isthmian Canal Commission, for and on behalf of the United States, of the first part, and the Ellicott Machine Company, represented by John B. Norris, a member of the firm, of Baltimore, State of Maryland, of the second part:

Witnesseth: That the said Isthmian Canal Commission, for and on behalf of the United States of America, and the said Ellicott Machine Company, do covenant and agree, to and with each other, as follows:

Article 1. That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310-C of the Isthmian Canal Commission, dated May 29th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch are attached hereto and form a part of this contract.

Article 2. The above steel dump barges shall be constructed, erected, and delivered by the party of the second part to the Isthmian Canal Commission at Baltimore, Maryland, as follows:

2 barges on or before December 6, 1906.
2 barges on or before February 19, 1907.
2 barges on or before May 5, 1907.

Article 3. That the party of the first part, by its duly authorized agent, shall have the right to inspect at any time during the
14 process of construction of these barges, any and all material and workmanship used, or to be used, in said construction, and such inspection of said barges, and of the material used, or to be used,

in the construction thereof, and of the workmanship thereon, may be made by the party of the first part, or its duly authorized agent, at any place where said materials may be found, and at the places of construction of said barges. In addition to the above, when said barges, or either of them, are pronounced by the party of the second part to be completed and ready for final inspection, such inspection may be made by the party of the first part, by its duly authorized agent, at the place or places where such barges, or either of them, have been constructed, such inspection being for the purpose of determining whether the same, or either of them, meet the requirements set forth in the letters, specifications, and blue print mentioned in article 1 hereof, and all of said inspections, whether preliminary or final, the party of the first part, by its duly authorized agent, shall have the right to reject any and all material used, or to be used, in the construction of said barges, or either of them, or in the workmanship thereon, when, in the judgment of the party of the first part, by its duly authorized agent, the same or any part thereof, does not conform to the requirements above mentioned.

Article 4. It is further expressly understood and agreed that the time of performance shall be the essence of this contract, and that in case of failure of the party of the second part to complete this contract within the time herein specified and agreed upon, namely, on or before May 5th, 1907, that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible, of definite ascertainment and proof, it is hereby stipulated and agreed that the amount of said damages shall be estimated, agreed upon, stated, liquidated, and fixed in advance, and they are hereby agreed upon, stated, liquidated, and fixed at the sum of fifteen dollars ($15.00) for each and every day the party of the second part shall delay in the completion of each of the said barges covered by this contract, and the party of the second part hereby agrees to pay to the United States of America as such liquidated damages, and not by way of penalty, the sum of fifteen dollars ($15.00) for each of said barges for each and every day the party of the second part shall delay in the completion of this contract, and that said United States of America shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States of America during such period of delay, and also whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

And said party of the first part may deduct or retain all the above-mentioned sums out of or from any money or reserved percentage that may be due or become due the party of the second part under this agreement.

Provided, however, That if the party of the second part shall by strikes, epidemics, local or state quarantine restrictions, or by abnormal force or violence of the elements, be actually prevented from completing the work or delivering the materials at the time herein agreed

upon, and such delay is without contributory negligence of the party of the second part, such additional time may, in the discretion of the chairman of the Isthmian Canal Commission, be allowed for such completion as, in the judgment of the party of the first part, or its successors, shall be just and reasonable.

Provided further, That in case of such delay the party of the second part shall give immediate notice in writing to the chairman of the Isthmian Canal Commission of the necessity for such extension, and said chairman may, in his discretion, accept such delays as sufficient cause for waiving said deductions; but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, except as so waived, and said rights and obligations shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

Article 5. The party of the second part further agrees to hold and save the United States harmless for and against all and any demand or demands of any nature or kind for or on account of the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Article 6. The party of the second part further agrees and contracts to keep the hull, machinery, fittings, and equipments of
16 the barges herein contracted for, and all machines and appliances provided for and used, or to be used, in the construction thereof, duly insured during the construction thereof and until the same are delivered and accepted by the Isthmian Canal Commission, which insurance shall be renewed and increased from time to time by and at the expense of the party of the second part, the loss, if any, to be stated in the policies as payable to the United States of America, and such insurance is to be effected in such manner and in such companies as shall be approved by the chairman of the Isthmian Canal Commission, and in an amount to be fixed from time to time by him, not exceeding, however, at any time, the sum of the payments made under this contract.

It is stipulated and agreed that no Member of or Delegate to Congress, nor any person holding any office or appointment under the Government of the United States, or under the Isthmian Canal Commission, is or shall be admitted to any share or part of this contract, or any interest of, in, or to the same, or any part thereof, or to any benefit or payment which may arise therefrom.

Article 7. It is further understood and agreed between the parties hereto that in case of the failure or neglect of the said party of the second part to fulfill the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part is authorized to direct purchases to be made of all necessary materials, and to cause the construction of the barges to be completed as herein specified and required, and the said party of the second part shall be liable to the United States of America, in such event, for any

excess in the cost of the construction of the barges over the price hereinafter named and stipulated to be paid therefor to said party of the second part.

Article 8. The barges herein contracted for shall be completed in accordance with the specifications, letter, and blueprint annexed hereto and made a part hereof, and shall be ready for delivery to the party of the first part on or before the times hereinbefore set forth; but the lien of the party of the first part upon said barges, and upon the materials for use in the construction thereof, respectively and collectively, for all amounts paid on account thereof, shall commence with the first payment, and shall thereupon attach to the work done and materials furnished or provided as the work progresses, and shall in like manner attach from time to time, and at all times, as
17 the work progresses and as further payments are made, and shall continue until it shall have been properly discharged by the delivery and acceptance of said dredges, or otherwise in the discretion of the Isthmian Canal Commission.

Article 9. The party of the first part agrees to pay, or cause to be paid, to the party of the second part the sum of sixteen thousand nine hundred dollars ($16,900) for each of the barges herein contracted for, making a total price for the six barges of one hundred and one thousand four hundred dollars ($101,400), upon their construction and delivery in accordance with the terms of this contract and the papers attached hereto. Payments shall be made by the party of the first part to the party of the second part in monthly instalments as the work progresses, to the amount of work done in each month, less the reservation of ten per centum (10%) of said amount, which work shall be ascertained by estimate made by the party of the second part, approved in writing by the inspector of the Isthmian Canal Commission in charge of said work; the balance of the payments on these barges shall be made after construction, erection, delivery, and acceptance at Baltimore, Maryland.

Article 10. Neither this contract, nor any interest therein, shall be transferred to any other party or parties, and in case of such transfer the United States of America may refuse to carry out this contract with either the transferor or the transferee, and all rights of action for any breach of any of the provisions of this contract by the party of the second part are reserved to the United States of America.

Article 11. It is further stipulated and agreed by and between the parties hereto that no expense outside this contract shall be incurred, nor shall the United States be held liable for any extra work beyond that stipulated in this contract, and in the specifications, letter and blueprint constituting a part hereof, unless such change and expense shall have first been authorized and approved in writing by the chairman of the Isthmian Canal Commission.

Article 12. If, at any time, during the prosecution of this work, it shall be found advantageous or necessary to make any change or modification in said barges, or either of them, and this change or modification should involve such alteration in the specifications as to char-

acter, quantity, and quality, whether of labor or material, as
18 would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices both of material and labor thus substituted for those specified in the original contract, and before taking effect must be approved by the chairman of the Isthmian Canal Commission: Provided, That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligations arising from such modification was incurred.

In witness whereof, the parties hereto, and each of them, have hereunto set their hands to this and to two duplicate instruments of identical tenor and effect the date first hereinbefore written.

In presence of:

W. P. ARMSTRONG, as to

ISTHMIAN CANAL COMMISSION.
By F. P. SHONTS, *Chairman.*

W. A. PATE, as to

ELLICOTT MACHINE COMPANY.
By JOHN B. NORRIS,
One of the Firm.

NOTE.—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "By" and under the name of the principal.

I certify to correctness of facts:

D. W. ROSS,
General Purchasing Officer.

19 # E-339.

JULY 27, 1906.

F. B. MALTBY, *Division Engineer*
(Through D. W. Ross, General Purchasing Officer,
Isthmian Canal Commission),
Washington, D. C.

DEAR SIR: In accordance with verbal request of D. W. Ross, general purchasing officer, in connection with our bid June 7th we submit print # 2105 revised July 27th, specifying details as called for in your letter June 26th, 1906, of hinges, hoisting gear and method of securing timber lining to hoppers.

We have also inserted on the drawing a schedule of displacement, load and draft showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire.

It has been the custom on previous similar contracts, the total weights and general design being clearly specified and defined in the contract to get out the working details under the supervision of a representative of the contracting officer as soon as possible after the execution of contract.

We shall be very glad if this contract can be awarded at once as the season is approaching in which such work cannot be advantageously prosecuted.

We take this opportunity to call your attention to the bid of the next lowest bidder, Winant of Brooklyn, N. Y.

A schedule of displacement on this bid will show as follows:

Displacement of hull as shown on maximum permissible draft line of 8′ 0″—20,263 cu. ft. at 65 lbs	1,317,095 lbs.
Deduct weight of minimum permissible loads—350 cu. yds. at 3,240 lbs.	1,134,000 lbs.
Net weight of barge including equipment	183,095 lbs.

From the above you will note that we are offering about 80,000 pounds more material on each barge than our competitor at about $1,000.00 less per barge.

Respectfully,

ELLICOTT MACHINE COMPANY.

20 ISTHMIAN CANAL COMMISSION, CANAL ZONE,
DEPARTMENT OF ENGINEERING AND CONSTRUCTION,
June 26, 1906.

File 33–C.

Mr. D. W. Ross,
General Purchasing Officer, I. C. C.,
Washington, D. C.

DEAR SIR: I am returning to you herewith, the papers received in connection with bids for dump barges. I send you a small sketch showing the desired arrangement of the hinges on the hopper doors, and the method of securing timber lining to hoppers.

It is noted that the drawing submitted by the Ellicott Machine Works does not show any details as required by the specifications. It is presumed however, (and we should insist on it) that the framing will be in strict accordance with our specifications. Their drawings show three hoppers, each 20 ft. long, but a small sketch shows the chains attached to the doors at the centre of each hopper, as well as at the ends, and this should be done. Chains supporting the doors should be attached to them at least every ten feet. The arrangement for hoisting the doors should be such as will enable us to drop them readily, through the use of a clutch of some sort. This is a very ordinary method, and it is only mentioned so that there may be no misunderstanding about it.

The sketch which I enclose is suggestive only, and may be varied in detail as the manufacturer desires; the requirements only being that the hinge on the door should be heavy and thoroughly bolted to the door; that it should be placed in such a position that when the

door is dropped it will not pinch on the sides of the opening: and furthermore, that they be secured by links to the fastenings on the sides of the hopper, above the light water line. The purpose of this arrangement is to enable us to pull up the doors, repair them and their hinges without docking the barge.

According to our specifications all of these details should have been furnished by the bidders with their proposal, and would have been approved or disapproved when accepting their bids. I
21 am willing, however, to waive this point, provided they are willing to build these details in the way which it was intended to cover in the specifications.

Yours, very truly,

(Signed) F. B. MALTBY,
Division Engineer.

Enclosures.
C. D.

(Form 607-D.)

(When principal if an individual or a partnership, and surety is a corporation.)

Bond for fulfillment of contract.

Know all men by these presents, that we, Charles E. Ellicott and John B. Norris, trading as Ellicott Machine Company, as principal, and United Surety Company, a corporation existing under the laws of the State of Maryland, as surety, are held and firmly bound unto the United States of America, in the penal sum of twenty thousand two hundred and eighty dollars ($20,280.00), for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Given under our hands and seals this thirteenth day of August, 1906.

CONDITIONS.

The conditions of the above obligation are such, that if the said above-bounden Ellicott Machine Company, their heirs, executors, administrators or successors, shall well and truly, and in a satisfactory manner, fulfill the contract hereto annexed, and deliver the articles mentioned within the time specified, and to the satisfaction of the said Isthmian Canal Commission, then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

In witness whereof the principals hereto have set their hands and seals on this thirteenth day of August, 1906, to this, and to two duplicate instruments of identical tenor and effect, and the surety
22 hereon has caused the same to be executed by its proper officer thereto duly authorized under a resolution of its board of

directors, passed on the 11th day of January, 1906, a copy of which is hereto attached.

In the presence of:

THOMAS H. ORTT, as to

CHARLES E. ELLICOTT. [L. S.]
(Principal).

THOMAS H. ORTT, as to

JOHN B. NORRIS. [L. S.]
(Principal).

UNITED SURETY COMPANY,
By HENRY G. PENNIMAN,
As its Vice-President.

Attest:

E. D. LIVINGSTON,
As its Ass't Secretary.

[L. S.]

(NOTE.—Here follows attested copy of resolutions empowering officers of the United Surety Company to execute bonds and other undertakings; also certificate of notary public as to execution and acknowledgement of foregoing instrument; both, however, here omitted in printing.)

Circular 310–C.

(Advertisement.)

ISTHMIAN CANAL COMMISSION,
OFFICE OF THE GENERAL PURCHASING OFFICER.
Washington, D. C., May 29, 1906.

Sealed proposals in triplicate will be received at this office until 2.30 p. m. June 8, 1906, at which time they will be opened in public for furnishing and delivering, free of all charges, at either Colon (Atlantic port), Isthmus of Panama, or any Atlantic or Gulf port in the United States, six (6) steel dump barges.

Each proposal must be accompanied by a property guaranty,
23 which should be prepared on one of the two forms hereto attached—either by a surety company or individual guarantors as bidders may elect.

Each individual guarantor will be required to justify in a sum equal to not less than twenty per centum of the value of the work or material covered by the proposal which he guarantees.

Preliminary inspection will be made at the point of manufacture or purchase to determine whether the material meets the requirements set forth in the specifications and final inspection will be made at the point of delivery as above.

Bidders must state where they propose to make delivery, the time when they propose to commence delivery, and within what time they will complete delivery after the receipt of notice of award, and the

general purchasing officer reserves the right, before making award or entering into contract, to fix a specified sum per day as liquidated damages for delinquency on the part of the contractor in performance of agreement.

Time of delivery will be considered in making the award as these barges are urgently needed.

All correspondence relating to this circular should refer to circular 310–C.

The commission reserves the right to reject any or all bids or accept any bid in the aggregate or part of same as may be deemed most advantageous.

Proposals must be signed by the bidder and inclosed in sealed envelope, marked "Proposals for steel dump barges, to be opened at 2.30 p. m., on the 8th day of June, 1906."

Cuts and full descriptions of the barges offered should be submitted with bids.

D. W. Ross,
General Purchasing Officer.

Zone Req. 753–A.

	Unit price.	Total price.
6 steel dump barges:		
Erected and delivered, free of all charges, at Colon, Isthmus of Panama ---------- each--		
Erected and delivered, free of all charges, at any Atlantic or Gulf port ---------- each--		

24 SPECIFICATIONS.

Proposals are invited for furnishing and delivering complete, free of all charges, at either Colon, Isthmus of Panama, or at any Atlantic or Gulf port, 6 steel dump barges, each with a capacity of not less than 350 nor more than 400 cubic yards.

If bidders do not care to bid for delivery at Colon bids will be considered for delivery at any Atlantic or Gulf port in the United States.

To permit the use of stock sizes of material and usual shop practice and patterns, a certain latitude in the details of construction will be permissible.

The following specifications and requirements are general only as indicating the class of construction desired.

Barges of heavy construction for rough service, built in accordance with best modern marine practice, are desired.

Bidders will be required to submit with their proposals plans in sufficient detail to show the proposed size of members and details of construction.

Bidders should state the time of delivery which they guarantee, and the time of delivery will be considered in awarding the contract.

The breadth of the barges should not be less than 25 feet nor more than 32 feet. They should have sufficient depth and length to carry a full load of sand on a draft of not more than 8 feet, and with not

less than 30″ freeboard when loaded. They will be rectangular in plan, with rake at each end about 11″ long.

There should be at least two hoppers with water-tight bulkheads between them extending to the deck. Bulkheads forming end of hoppers should extend entirely across the barge, framed to floor and deck beams and side beams, and to be made water-tight. In case only two hoppers are built, each compartment alongside of each hopper should have a water-tight bulkhead near its center. All bulkheads to be framed to frames, floor, and deck timbers with the best marine practice.

The sides of the hoppers should have an inclination of at least 60° with the vertical. Hopper doors must open the full size of the bottom of the hopper. The sides of the hopper must be framed with not less than 4″ x 5″ x ⅜″ angles, spaced 24″ center to center, plated with 21-pound plate and lined throughout with 4″ x 8″ timbers set on end to prevent injury to hoppers when loading rock. This lining must be supported on the bottom by an angle or channel iron so formed as to hold the bottom of this timber lining in place. The tops of the timbers must be held in place in the same manner. It will not be permissible to bolt this timber to the sides of the hopper.

The hopper doors should be of wood at least 6″ in thickness, lined on both sides with 15-pound plate; this lining to be held in place by screw bolts passing entirely through the doors. Hinges for supporting the doors should be of the loose-link type of cast steel, thoroughly secured to the hull and to the doors. Details should be furnished.

Mechanism for supporting and operating the hopper doors must be shown in detail. It will be operated by manual power.

FRAMING.

Floor beams forward and aft of the hoppers and in the rake should not be less than 10″ deep and extend in one piece to the turn of the bilges. They will be spaced 24″ center to center. Frames to be not less than 3½″ x 5½″ angles overlapping the floors not less than 18″ and connected with them and to floor beams with proper gusset plates. Bilges to be of as short radius as it is practicable to bend the angles and plates.

In addition to the transverse bulkheads mentioned above there will be a water-tight bulkhead at each end of each rake.

Transverse water-tight bulkheads will be made of 10.2 pound plate with double-riveted lap joints, stiffened with vertical angle bars 3″ x 3″ x 5 1/6″, spaced 2′ apart, except that the plates forming the ends of the hoppers will be of 21-pound plate, stiffened with 4″ x 4″ x ⅝″ angle bars, spaced 2′ apart.

In the space forward and aft of the hoppers there should be a central longitudinal bulkhead of 10.2 pound plate, fastened at the top of the floor beams and deck beams by 4″ x 4″ x ⅝″ angle; it will be stiffened by vertical 3″ x 3″ x 5/16″ angles, spaced 2′ apart.

This bulkhead should extend from the hoppers to each end of the barges.

26 In addition to this bulkhead there will be 2 longitudinal lattice trusses, one on each side midway from the center bulkhead to the side of the hull. They will have top and bottom cords of 3″ x 3″ x 5/16″ angles riveted to each floor and deck beam, lattice bars to be 3″ x 3″ x 5/16″ angles made in double panels and joined top and bottom with proper gusset plates with not less than 3 rivets in each landing. These trusses will extend from the hoppers to the rake.

In the rake there should be a 3″ x 3″ x $\frac{3}{8}$″ angle stanchion secured to each deck beam and floor timber on line with the said trusses.

Deck beams to be of 5″ x $\frac{3}{8}$″ Z bars spaced one to each frame, each beam to be attached to its frame by 5/16″ gusset.

Gunwales to be not less than 4½″ x 4½″ x 7/16″ angle running inside the side plating and below the deck.

The hull plating should be 21-pound on the bottom; bilges should be 21-pound; the side plating may be of 18-pound plate and in not more than 2 streaks.

The deck should have a checkered stringer streak on each side 30″ wide and about 7/16″ thick; remaining deck may be of 15-pound plating.

All plating to be worked "in" and "out" on longitudinal streaks; longitudinal laps to be double-riveted. All girth seams to be double-riveted to butt straps.

There should be a nosing or fender streak of 8″ x 8″ yellow pine, supported by 4″ x 4″ x $\frac{3}{8}$″ angles top and bottom. This nosing should extend entirely about the barge. On each side of the full length there should be a second fender streak of the same section about 3′ below the deck.

HATCHES.

There should be a hatch 18″ in diameter opening into each compartment of the hull, each hatch to be fitted with cast-iron cover made flush with the deck, water-tight, and with means of bolting it down. Iron ladder 18″ wide should be provided for each hatch.

BITTS AND CHOCKS.

There should be 4 heavy cast-iron towing bitts secured with 1″ bolts, 1 heavy cast-iron kevil amidships on each side, and 6 open shocks secured with 1″ bolts.

27 PAINTING.

The ironwork must be thoroughly freed from scale, rust, grease, or dirt and be painted with 3 coats of approved paint, the last two coats to be applied after assembling and riveting up.

A steam-driven bilge pump should be supplied with each barge, with suction pipes running to each compartment; the pump will be supplied with steam from other boats.

CHARTS

TOO

LARGE

FOR

FILMING

CHARTS

TOO LARGE FOR FILMING

Will commence delivery of barges within days and complete same within days after receipt of notice of award.

(Here follow drawings marked pp. 27[a] and 27[b].)

28 II. TRAVERSE.—*Filed April 2, 1908.*

In the Court of Claims of the United States, December term, A. D. 1908.

ELLICOTT MACHINE CO.
vs.
THE UNITED STATES. } No. 29907.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

29 III. ARGUMENT AND SUBMISSION OF CASE.

On the 2d day of April, 1908, this case came on to be heard, and was argued by Mr. James Piper and Mr. A. A. Hoehling, jr., for the claimants, and by Mr. S. S. Ashbaugh for the defendants, and submitted.

30 IV. FINDINGS OF FACT (AS AMENDED) AND CONCLUSION OF LAW, AND OPINION OF THE COURT.—*Filed as of May 18, 1908.*

CHARLES E. ELLICOTT AND JOHN B. NORRIS, Copartners, trading as Ellicott Machine Company.
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Charles E. Ellicott and John B. Norris, are copartners, trading as Ellicott Machine Company, and are citizens of the United States, residents of the State of Maryland, and doing business in the city of Baltimore.

II.

In the month of April, 1906, the Isthmian Canal Commission issued a circular letter and advertisement asking for proposals for the construction and delivery of six steel dump barges; but one bid was received thereunder, which was rejected, and a new circular letter and

advertisement was issued asking for proposals, upon which two proposals were received and both laid aside, and new proposals were again asked for under a new advertisement, circular letter, and specifications, all of which are set forth in the petition.

III.

In answer to said advertisement various bids for the construction of said six steel barges were filed with the commission, and on June 8, 1906, the same were opened in accordance with the announcement, and were as follows:

William Cramp & Sons, Philadelphia	each	$31,500
Ellicott Machine Company, Baltimore, Md	do	16,900
Fore River Ship and Engine Building Company, Quincy, Mass	do	50,000
Maryland Steel Company, Sparrows Point, Md	do	27,950
T. S. Marvel Ship Building Company, Newburgh, N. Y	do	26,000
Motley, Green & Co., New York:		
Colon		22,750
Liverpool (knocked down)		20,750
Newport News Ship Building Company, Newport News, Va	for the lot	149,000
William E. Winant, Brooklyn, N. Y	do	111,000

31 IV.

The proposal and bid of the claimants of $16,900 for each of said six barges, which was the lowest, was as follows:

ELLICOTT MACHINE COMPANY,
OFFICES AND SHOPS, BUSH AND SEVERN STREETS,
Baltimore, Md., June 7, 1906.

SCHEDULE.

Six steel dump barges erected and delivered free of all charges at Baltimore, Maryland, subject to specifications of circular 310–C with such modifications as are shown on drawing #2105, dated June 7th submitted herewith, each sixteen thousand nine hundred dollars ($16,900). Total, one hundred one thousand four hundred dollars ($101,400.00).

Time of delivery.—For the completion of the entire contract two hundred and seventy (270) days.

Payments.—Partial payments will be made monthly for the barges and parts during construction. From each partial payment ten (10) per cent will be retained until the delivery of each of the barges and parts, when the retained percentage will be paid to the contractor.

Insurance.—It is agreed that preceding each partial payment the contractor is to have the barges and their parts insured against fire and marine risk at his own cost for and in behalf of the United States, in the name of the officer who makes the contract for their construction to an amount at least equal to the amount of said partial payment, and is thereafter to keep the said property so insured to at

least the full aggregate of the payments made upon it by the United States until delivery.

PROPOSALS FOR SIX STEEL DUMP BARGES.

(Place) BALTIMORE, MARYLAND.
(Date) *June 7th, 1906.*

To the General Purchasing Officer,
Isthmian Canal Commission, Washington, D. C.

SIR: In accordance with your advertisement and specifications dated May 29th, 1906, inviting proposals for six steel dump barges and subject to all the conditions and requirements thereof, copies of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we propose to furnish and deliver at Baltimore, Maryland, the articles specified in the foregoing "Schedule" at the price set opposite each.

We make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and should we receive written notice of the acceptance of all, or any part thereof, we will furnish the articles specified at the prices and at the place, and in the manner, and within the time indicated in this proposal; and will, if required by the Isthmian Canal Commission, by its proper officer, enter into formal contract within the time indicated in this proposal and the instructions contained hereon, with good and sufficient sureties,
32 to be approved by the Isthmian Canal Commission, for the faithful performance thereof. If no formal contract is required, the attached bond shall be effective as a guaranty for the faithful execution of any orders placed with us under this proposal.

(Signature) ————————.
(Street and number) ————————.
(Post-office) ————————.
(State and county) ————————.

V.

On July 27, 1906, in response to a letter of F. B. Maltby, division engineer, dated June 26, 1906, describing certain amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers, claimant addressed a letter to said division engineer transmitting a blueprint, No. 2105, which specified the details called for in said letter and showing the displacement and net weight, including equipment of the barge to be furnished.

Said letters of June 26 and July 27, 1903, and drawing No. 2105 are set forth in the petition.

VI.

On August 17, 1906, a contract under date of July 12, 1906, was signed by John B. Norris, representing the claimant, for the construction and delivery of said barges in accordance with the specifications contained in circular letter 310–C, dated May 29, 1906, with

such modifications as are shown on drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, outlined in letter of Ellicott Machine Company, dated July 27, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with accompanying sketch, was signed by T. P. Shonts, August 28, 1906, acting on behalf of the United States.

Said contract, specifications, drawing, and letters are fully set forth in the petition.

VII.

On August 30, 1906, claimant presented to Turman M. Post, government inspector of dredges, its bill of materials intended to be used by them in the construction of said barges, but upon examination of said list of materials it was found by said inspector of dredges that the barges which the claimants proposed to construct were different from those described in circular letter and specifications 310-C, set forth in the petition, the principal component parts or members being reduced in weight, size, and power of resistance, and thereupon the same was disapproved by the officers of the Government. The list of materials so submitted for the approval of the inspector of the Government was in conformity with said specification 310-C, as modified by the parties as set forth in article 1 of said contract. That is to say, the materials so submitted in conformity with said specifications were subsequently reduced in both weight and strength to conform to the barges proposed to be constructed by claimants.

33

VIII.

Claimants at all times have held themselves in readiness and willing to comply with said contract dated July 12, 1906, in accordance with specifications contained in circular 310-C, with such modifications as are shown on the drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, but have been prevented from so doing by the defendants, who insisted that said barges be erected strictly in accordance with the detailed specifications contained in circular 310-C and thereafter awarded the contract for the construction of said six steel barges to the Newport News Shipbuilding Company.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are entitled to recover judgment in the sum of ten thousand dollars ($10,000).

OPINION.

ATKINSON, J., delivered the opinion of the court:

This suit is based upon a written contract between claimants and the United States, wherein claimants agreed to build six steel dump barges for the sum of $101,400. The contract is dated July 12, 1906,

was signed and executed by claimants August 17, 1906, and by Theodore P. Shonts, chairman of the Isthmian Canal Commission, August 28, 1906. The contract provides for the construction of six steel dump barges in accordance with specifications in circular 310–C of the Isthmian Canal Commission, dated May 29, 1906, with such modifications as are shown on drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, outlined by letter of plaintiffs of July 27, 1906, subject to such amendments as provided by correspondence between the parties in interest, all of which are made a part of the contract. It further provides for the inspection of the barges by agents of the defendants, and also for the payment of liquidated damages at the rate of $15 per day for failure to construct and deliver all of the barges to defendants on or before May 5, 1907, at a point to be designated by them. The specifications contained in circular No. 310–C provide the manner in which proposals for the construction of the barges shall be made, their size, weight, capacity, guaranty for faithful performance of the requirements of the contract, inspection, time of delivery, etc. The letter of claimants of July 27, 1906, together with a blueprint, No. 2105, which contains measurements, weights, etc., of the barges, explanatory of claimants' bid for the construction of the same, are all set forth in the petition.

The litigation in this case resulted from what seems to have been an apparent misunderstanding by the agents of the defendants, as to certain changes in the terms of an original advertisement for bids for the construction of the said six steel dump barges of a specified size, strength, and weight, to be used by the defendants in the construction of the Isthmian Canal, claimants having agreed to construct said barges under the specifications contained in the original advertisement for the sum of $148,400; but said bid, with all others, was
34 rejected for the reason that they were believed by the agents of the defendants to be excessive. Under a subsequent advertisement for bids claimants submitted another offer to construct the six dump barges of the same dimensions, but of lighter material and weight, for the sum of $101,400, which latter bid was accepted by defendants, though it is claimed by them that it was done through a misconception and a misunderstanding of the terms of the bid, and a contract thereunder was duly made and signed by claimants and the agents and representatives of the defendants. After the execution of the contract, defendants made an examination of the materials to be used by claimants, as set out by them in their proposal and bid, and found that they were different in size and weight from those described in their circular letter and specifications 310-C, the principal component parts or members having been reduced in strength as well as in weight, durability, size, and power of resistance, and thereupon the same were disapproved and rejected by the engineer officers of the defendants. Demand was thereupon made that claimants should adhere to the original specifications, which they refused to do, and as a result of such refusal the defendants abrogated their contract, gave

the construction of the said six barges to the Newport News Shipbuilding Company, for the sum of $149,000; and for the failure of defendants to comply with the provisions of the contract duly made and executed by them, claimants bring this suit to recover damages for breach of contract, in the sum of $30,000, they having tendered performance, and claim that they have been at all times ready, willing, and able to execute the work in accordance with the provisions of the contract.

It is argued on behalf of the claimants that the contract is clear and unambiguous in terms, and that the same rules must be applied as to reciprocal rights and obligations (subject only to certain limitations in respect of agents exceeding their authority) between the United States and an individual, in respect of contracts between them, as are applied to contracts between individual citizens. In other words, the United States must stand upon the same footing as an individual, and therefore they can not arbitrarily annul formally executed contracts. (Smoot *v.* United States, 15 Wall., 36; Chicago and N. W. Ry. *v.* United States, 104 U. S., 680.)

It was known to claimants that defendants desired six steel barges at a cost not to exceed $90,000; that the lowest bid offered under the first advertisement was $148,400, which was claimants' own bid, and which bid was rejected, because it was believed to be excessive. Claimants thereupon submitted a proposition to construct barges of the same dimensions, but of lighter weight and material, as the findings and the contract show, for $101,400. At the opening of the proposals, June 8, 1906, when claimants' bid, which was the lowest, was accepted, the bids were $101,400, $111,000, $149,000, $136,500, $156,000, $177,400, $189,000, and $200,000. The very fact of this great difference in the amounts of the bids, taken in connection with claimants' former bid of $148,400, it seems to us, was sufficient in itself to have put the defendants on inquiry. Attention was called to this fact by claimants in their letter of July 27, 1906 (Finding IV), to the defendants' division engineer, wherein attention was called to the weight of the barges proposed by the bid of a Brooklyn, N. Y., firm for $111,000, as compared with the weight of the barges which
35 claimants proposed to build, which letter of claimants revealed the fact that the two firms were evidently bidding on a different character of barges. The attention of defendants was further called to this same fact by a conspicuous note on a large blueprint prepared by claimants, which is attached to and is made a part of the contract, which note gives the net weight of the barges, and this weight was to be distributed in such manner as the defendants might direct. It is apparent, therefore, if the printed specifications are to govern, the letter of July 27, supra, and the blueprint No. 2105, will have to be entirely ignored. The wording of Article 1 of the contract, we think, disposes of this conflict. It provides that the six steel dump barges are to be constructed " in accordance with specifications contained in circular 310 C of the Isthmian Canal Commission, dated May 29, 1906, with such modifications as are shown on drawing No.

2105, dated June 7, 1906, and revised July 27, 1906, outlined in letter of Ellicott Machine Company, dated July 27, 1906 * * * copy of which specifications, drawing, letters, and sketch are attached hereto and form part of this contract."

When a contract is duly signed prior negotiations become merged in it, and to ascertain the intention of the parties thereto we must look to the contract alone. If the parties to a contract have reduced it to writing, they must intend such writing to be the repository of their common intentions. It merges all prior and contemporaneous negotiations. Extrinsic evidence is inadmissible in an action on a written contract to show the understanding of the meaning and effect of such contract entertained by one or both of the parties thereto when the contract was entered into. (Page on Contracts, §§ 86, 1189, 1193.)

If a party to a contract is able to but does not read it, then he is negligent, and can not plead this negligence in his defense. "Some courts lay it down as a broad principle that one who enters into a contract under mistake of fact due to his own negligence, concerning which he could with reasonable diligence have learned the truth, can not have relief. (Page on Contracts, § 80.) "A mistake as to a matter of fact to warrant relief in equity must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved." (Kerr on Mistake and Fraud, 408; Grymes *v.* Sanders, 93 U. S., 55; Barker *v.* Ry., 65 Fed., 460; Northern Assurance Co. *v.* G. V. Building Assn., 183 U. S., 308.)

Page on Contracts, section 79, further says:

"Every sane person is held to intend the legal consequences of his voluntary acts. Accordingly, if a person of legal capacity and not acting under fraud, misrepresentation, duress, or undue influence goes through the outward form of binding himself by contract, he can not avoid liability thereon by claiming that unknown to the adversary party he made his offer or acceptance under mistake of fact, and that he did not intend to make such offer. A mistake of this kind (i. e., mistake as to the subject-matter of the contract) is generally inoperative, because parties are bound by what they say
and do, and the courts will not consider what they think and
36 believe, in the event of a difference between the two. If an
article bought does not possess the qualities attributed to it by the purchaser the case is governed by the maxim caveat emptor, unless the seller has caused the mistake by his fraud or unless there has been a warranty."

Does the case at bar come within the cases cited? We hold that it does. The findings fail to reveal misrepresentation and fraud by claimants, but reveal a degree of negligence on the part of the agents of the defendants from which they can not be allowed to extricate themselves by the abrogation of a duly executed contract in order to shield themselves from responsibility.

In consideration of all of the facts in the case, and in view of the difference between the cost of doing certain work and what claimants were to receive for it, making reasonable deduction of the less time engaged and release from the care, cost, risk, and responsibility attending a full execution of the contract, the court decides that claimants are entitled to recover as profits the sum of $10,000, and accordingly judgment against the defendants for said amount is hereby ordered.

BY THE COURT.

Howry, J., was not present when this case was tried and took no part in the decision.

37 V. JUDGMENT OF THE COURT.

At a Court of Claims held in the city of Washington on the 18th day of May, 1908, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said Charles E. Ellicott and John B. Norris, copartners, trading as Ellicott Machine Company, claimant, do have and recover of and from the United States the sum of ten thousand dollars ($10,000.00).

BY THE COURT.

38 VI. ARGUMENT AND SUBMISSION OF DEFENDANTS' MOTION FOR NEW TRIAL AND ORDER THEREON.

On the 23d day of November, 1908, the defendants' motion for a new trial, filed August 10, 1908, was argued by Mr. S. S. Ashbaugh for the defendants in support of said motion, and by Mr. James Piper, attorney for claimant, opposed, and the motion was submitted.

On the 4th day of January, 1909, the court filed the following order:

Overruled.

STANTON J. PEELLE,
Chief Justice.

Mr. Justice Atkinson filed an opinion in support of said order.

39 Court of Claims of the United States.

(Decided January 4, 1909.)

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, trading as Ellicott Machine Company,
v.
THE UNITED STATES. } No. 29907.

ATKINSON, J., delivered the opinion of the court.

The defendants file a motion herein for a new trial on the grounds that the findings and judgment of the court are contrary to the law and the evidence.

While it is true, as argued at bar, that there was a material difference between the claimants' first bid for the construction of the six barges for the Isthmian Canal Commission (under the Government's advertising circular, No. 310–C, which specified the size and strength of the barges desired by said commission), yet it was so specifically and clearly stated by the claimant in its second bid for the construction of the desired barges, the strength, weight, and measurement of the same being in detail specifically set forth, all which being agreed upon as shown by the contract, that we can not see any means of escape for the defendants upon either the law or the facts involved.

The Government's proposal in its specifications was for the construction of six steel dump barges. The bid of the claimant was for six steel dump barges. The specifications suggested that the barges should be of a certain length, beam, and draft. The bid of the claimant proposed to construct barges of the same length, beam, and draft. The specifications called for a certain carrying capacity. The bid covered specifically these requirements. The specifications required the rake, hoppers, with water-tight bulkheads, inclination of hoppers, method of bolting same, etc. The bid proposed the construction of barges meeting all of these requirements. In short, the only difference in the barges which the claimant proposed in its contract to construct under its bid was a difference in weight of framing and plates from those contained in the advertisement of the defendants' circular No. 310–C.

It is elementary that there must be a meeting of minds of the contracting parties in order to make a contract valid and binding. The decisions of the courts and all text-book writers agree on this proposition. It is argued, however, by counsel for the United States that in the case at bar there was not and could not have been a meeting of minds of the contracting parties when the contract involved herein was prepared and signed. The best evidence of the meaning and intent of a contract is the contract itself. If the language used by the contracting parties is plain and unambiguous, and there is no proof of concealment or fraud, there can be no need of the intervention of a court to pass upon such contract or to construe its meaning.

The law relating to a mistake and as to the nature and qualities of the subject-matter of a contract is also well settled. When a formal contract has been entered into, in order to void the same on the ground of mistake, the mistake must be mutual. The fact that the mistake, if any, in the present contract is not mutual seems to have been overlooked by defendants' counsel in the citation of authorities, as practically all of the authorities quoted in his brief relate to a mutual mistake as to the existence or quality of the subject contracted for. The other authorities quoted relate to a rescission of a contract or its cancellation in a court of equity or to the requirement of good faith on the part of a party where specific performance is sought. These authorities, as we construe them, do not govern the case at bar, which is a suit for damages for breach of a contract valid on its face.

But even if it be claimed that a mistake entitling the defendants to a rescission, it must be a mutual mistake or must have been induced by the fraud or misrepresentation of the claimant; and where it was not induced by fraud the court should place the parties in statu quo. In the cases cited there is no intimation that the mistakes resulted from the negligence of one of the parties to the contract. It seems clear, therefore, that the mistake as to the nature, quality, or existence of the subject-matter must be mutual in order to say that there was no "meeting of the minds" and, therefore, no contract.

As stated in our former opinion, where two or more parties enter into a contract they are mutually bound by the terms thereof, although the understanding of one of them may differ from the other as to the intent and meaning of the same (Baines *v.* Woodfall, 6 C. B. N. S., 637; Miller *v.* Lord, 11 Pick. (Mass.), 11). Also see Page on Contracts and the collation of authorities in 7 Amer. & Eng. Enc. of Law, p. 117, et seq.; Hardy *v.* United States, 9 C. Cls. R., 244; Brawley *v.* United States, 96 U. S. R., 168; Foster, Fed. Pr., p. 1050.

Inasmuch as no additional evidence has been offered since the trial and disposition of this case bearing upon the lack of knowledge of the contracting parties as to the full meaning, intent, and purpose of said parties, and no evidence of concealment, deception, or fraud on the part of the claimant is presented in favor of the motion before us, we can see no reason why the motion should be sustained.

Nor do we agree, as contended, that there was a substitution of different strength and material for those provided in the specifications of the defendants as to the manner of constructing the barges. On the contrary, it would be rather a modification thereof. It is admitted that the defendants desired barges of a certain weight and strength, but when it was learned that they could not be manufactured for anything like the price expected by the agents of the defendants the claimant tendered a bid to construct barges of the same dimensions but of less strength and weight, which bid was accepted and a contract was drawn thereunder and was duly signed and executed by the parties thereto. It is true there was no advertisement for bids under the reduced weight and strength of
41 material to be used in claimants' contract, still it seems unreasonable to us for defendants to insist that no modifications can be made by the parties to a contract in the details of the specifications submitted. Indeed, to make modifications of this kind is the rule rather than the exception. The purpose of an advertisement is to stimulate competition and to prevent favoritism. These barges, as a matter of fact, were advertised for three times, covering a continuous period of forty-two days; hence it can not be claimed that it was not known among competitors that the United States desired to purchase six steel dump barges for use on the Isthmian Canal.

Considering again the whole case, no satisfactory reason having been offered, and no authorities cited as controlling, we reaffirm our former opinion in this case. Accordingly the motion for a new trial is overruled.

Howry and Barney, JJ., did not hear this case tried and took no part in the decision.

Filed January 4, 1909.

42 VII. ARGUMENT AND SUBMISSION OF DEFENDANTS' MOTION TO AMEND FINDINGS OF FACT AND ORDER THEREON.

On the 8th day of February, 1909, the motion of the defendants, filed January 21, 1909, to amend the findings of fact, was argued by Mr. S. S. Ashbaugh in favor of said motion, and Mr. James Piper and Mr. A. A. Hoehling, jr., apposed, and submitted.

On February 15, 1909, the court filed the following order thereon:

Overruled in part and allowed in part as to Finding VII.

BY THE COURT.
STANTON J. PEELLE,
Chief Justice.

43 VIII. APPLICATION OF DEFENDANTS FOR, AND ALLOWANCE OF, APPEAL.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, trading as Ellicott Machine Co.,
vs.
THE UNITED STATES. } No. 29907.

From the judgment rendered in the above-entitled cause on the 4th day of January, 1909, in favor of claimant, the defendants, by their Attorney-General, on the 25th day of February, 1909, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney-General.

Filed February 25, 1909.

Ordered that the above application for appeal be allowed as prayed for. June 10, 1909.

BY THE COURT.

44 In the Court of Claims.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, trading as Ellicott Machine Company,
vs.
THE UNITED STATES. } No. 29907.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in said cause; of the findings of fact and conclusion of law and opinion of the court; of the judgment of the court; of the argument and submission of the motions of defendants for new trial and for amendment of findings

of fact, and the orders of the court thereon; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 7 day of July 1909.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 21747. Court of Claims. Term No. 521. The United States, appellant, *vs.* Charles E. Ellicott and John B. Norris, copartners, trading as Ellicott Machine Company. Filed July 8, 1909. File No. 21747.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, APPELLANT,
v.
CHARLES E. ELLICOTT AND JOHN B. NORRIS, copartners, trading as Ellicott Machine Company, appellee. } No. 521.

APPEAL FROM THE COURT OF CLAIMS.

MOTION FOR ADDITIONAL FINDINGS OF FACT.

The Solicitor-General, in behalf of the United States, moves the court to remand the above-entitled cause to the Court of Claims of the United States with instructions to find and certify to this court, as matters of fact, in addition to the facts found and certified in the record now before the court—

> First. Whether or not the officers of the Isthmian Canal Commission knew before or at the time of the execution of the writing sued on in this case that the Ellicott Machine Company, appellee, did not propose or intend to construct barges of materials of the size and weight prescribed in the specifications contained in Circular No. 310–C of said commission,

inviting proposals for the construction of said barges, and attached to and made a part of said writing;

Second. The difference between the weight of the barges proposed to be constructed by appellee, that is, 260,000 pounds each, and the estimated weight of barges of like dimensions built with materials of the weight and size specified in said Circular No. 310–C;

Third. In detail, the differences in weight or size (as may be the proper basis for comparison upon the evidence in the record) between the different sorts of structural materials prescribed in said Circular No. 310–C and the materials to be used for like purposes, respectively, which were described in the list of materials submitted by appellee to Turman M. Post, government inspector of dredges, and referred to in Finding No. VII;

And to return said record with said additional findings of fact to this court with all convenient speed.

In support of said motion the Solicitor-General submits herewith the affidavit of S. S. Ashbaugh, showing that findings on said points were duly asked for in the Court of Claims, that the evidence in the record in said Court of Claims upon which such additional findings of fact must be based is undisputed and sufficient to enable said Court of Claims to promptly and specifically find the same; together with a brief as to the propriety of this motion and the necessity for said additional findings.

LLOYD W. BOWERS,
Solicitor-General.

DISTRICT OF COLUMBIA, *ss:*

S. S. Ashbaugh, being first duly sworn, says that he acted as attorney for the United States at the trial of the above-entitled cause in the Court of Claims of the United States, and is familiar with the record and proceedings in said cause in said court; that in said record and proceedings it appears by the testimony of Theodore P. Shonts, who was formerly Chairman of the Isthmian Canal Commission and who executed the instrument sued on in behalf of said Commission, and from the evidence of Frank B. Maltby, formerly principal assistant engineer of the Isthmian Canal Commission, who was the officer in immediate charge of the preparation of the specifications and the examination of the proposals for the construction of the barges referred to in said instrument, that neither of said officers knew before or at the time of the execution of said instrument that the barges proposed to be constructed by said appellee could not be built of materials of the size and weight specified without exceeding in weight 260,000 pounds; that it also appears from the testimony of John B. Norris and C. E. Ellicott, the members of appellee firm, that the barges proposed to be constructed by appellee were not intended by it to be of substantially the weight and strength specified, but were intended to be and were in fact radically different in strength and weight; that said Ellicott estimated that a barge of the dimensions shown on the plan submitted by appellee would weigh not less than 425,000 pounds if constructed of materials such

as were specified in said Circular No. 310–C, and that other witnesses estimated the minimum weight of such a barge at as high as 450,000 pounds, but none at less than 425,000 pounds; that Turman M. Post, the government inspector of dredges referred to in Finding No. VII of the Court of Claims, testified in detail as to the differences between the weight or size (as the case might be) of the materials specified in Circular 310–C aforesaid and those shown on the bill of materials submitted by appellee to him, showing such differences to have been as follows:

Item.	Government specification.	Claimant's bid.	Per cent of reduction.
Bottom plating	21 lb.	10.2 lb.	51
Side plating	18 lb.	10.2 lb.	43
Side plating of hoppers	21 lb.	10.2 lb.	51
End plating of hoppers	21 lb.	10.2 lb.	51
Deck-beam gussets	$\frac{5}{16}$	10.2 lb.	19
Deck plating	15 lb.	10.2 lb.	32
Floor beams at ends	10 in.	8 in.	20
Deck beams	$5\times\frac{3}{8}$	$2\frac{1}{16}\times3\times\frac{1}{4}$	51
Hopper supports	$4\times5\times\frac{3}{8}$	$3\frac{1}{2}\times2\frac{1}{2}\times\frac{5}{16}$	44
Bulkhead stiffener	$3\times3\times\frac{5}{16}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{3}{16}$	54
Bulkhead stiffener at ends of hoppers.	$4\times4\times\frac{3}{8}$	$3\times3\times\frac{1}{4}$	50
Rake stanchions	$3\times3\times\frac{3}{8}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	43
Bulkhead rim angles	$4\times4\times\frac{3}{8}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	58
Truss-frame diagonals	$3\times3\times\frac{5}{16}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	54
Truss-frame horizontals	$3\times3\times\frac{5}{16}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	54
Gunwale	$4\frac{1}{2}\times4\frac{1}{2}\times\frac{7}{16}$	$3\frac{1}{2}\times3\times\frac{5}{16}$	41
Fender angles	$4\times4\times\frac{3}{8}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	58
Side frames	$5\times3\frac{1}{2}\times\frac{3}{8}$	$3\frac{1}{2}\times2\frac{1}{2}\times\frac{5}{16}$	41
Covering plate for gates	15 lb.	10.2 lb.	32
Timber lining of hoppers	4 in.	$2\frac{1}{2}$ in.	37
Net weight	450,000 lbs.	260,000 lbs.	45

That all of said evidence was undisputed and is to be found in the order above set out at pages 135–6, 117–18, 60, 82–3, and 129–30, of the record in said above-entitled cause in the Court of Claims, and that the defendant endeavored to obtain findings on

said points in said Court of Claims as appears from the copies of various motions hereto attached which were filed and constitute parts of the record of said case in said Court of Claims.

S. S. ASHBAUGH.

Subscribed and sworn to before me this 25th day of February, A. D. 1910.

[SEAL.]

J. H. MACKEY,
Notary Public, District of Columbia.

In the Court of Claims of the United States.

CHARLES E. ELLICOTT AND JOHN B. Norris, copartners, trading as Ellicott Machine Company,
v.
THE UNITED STATES.
No. 29907.

MOTION OF DEFENDANT FOR NEW TRIAL.

Comes now the defendant above named, by its Attorney-General, and moves the court to vacate and set aside certain findings of fact and conclusions of law, and the judgment heretofore entered in this case on May 18, 1908, and to make other findings of fact and conclusions of law for the following reasons, to wit:

First.

The court committed an error of fact in Finding VII, wherein the court says: "The list of materials so submitted for the approval of the inspector of the Government was in conformity with said Specification 310–C as modified by the parties as set forth in article 1 of said contract;" whereas in truth and in fact said sentence should read as follows: "The

list of materials so submitted for the approval of the inspector of the Government was not in conformity with said Specification 310–C, but was on a radically and materially different contract."

Second.

The court committed an error of fact in Finding VIII, wherein it is stated that the claimant was ready and willing to comply with the contract dated July 12, 1906, "in accordance with specifications contained in Circular 310–C with such modifications as are shown on drawing No. 2105 dated June 7, 1906, and revised July 27, 1906;" whereas in truth and in fact the two propositions mentioned in Circular 310–C and in the letter of July 27, 1906, are so radically and materially different that the fulfillment of the one could not be in accordance with the other.

Third.

The court committed an error of fact in not finding that the minds of the parties never met upon a single proposition, and that the pretended contract so signed on July 12, 1906, was void for total misunderstanding.

Fourth.

The court committed an error of law in holding that there was no misrepresentation or fraud in the proposition so presented by the claimants as a substitute for the proposition presented by the Government in Circular 310–C.

Fifth.

The court committed an error of law in the assessment of damages and in holding that if the officers and agents of the Government were even negligent in not fully reading and comprehending the proposition of the claimant submitted on July 27, 1906, the claimant could recover as profits upon a supposed contract in any sum whatever.

Sixth.

The court committed an error of law in not holding that even if the officers and agents of the Government were negligent in not fully reading and comprehending the claimant's proposition submitted on July 27, 1906, the claimant could recover any further sum than his actual loss and expenses incurred.

For the errors above enumerated the defendant requests the court to set aside the judgment heretofore rendered herein, to grant a new trial and to remand the case to the general docket for further argument.

Respectfully submitted.

JOHN Q. THOMPSON,
Assistant Attorney-General.

S. S. ASHBAUGH,
Assistant Attorney.

In the Court of Claims of the United States.

CHARLES E. ELLICOTT AND JOHN B. Norris, copartners, trading as the Ellicott Machine Company, claimants,

v.

THE UNITED STATES.

No. 29907.

MOTION TO AMEND FINDINGS OF FACT.

Come now the defendants above named, by their Attorney-General, and move the court to amend the findings of fact heretofore filed herein by making the following findings of fact in lieu of Findings VII and VIII heretofore made by the court:

VII.

On August 30, 1906, claimants presented to Truman M. Post, government inspector of dredges, their bill of materials intended to be used by them in the construction of said barges, but upon examination of said list of materials it was found by said inspector of dredges that the barges which the claimants proposed to construct were different from those described in circular letter and Specifications 310–C,

set forth in the petition, the principal component parts or members being reduced in weight and size 45 per cent, and in power of resistance, as shown in the evidence, as follows:

(Here follows the comparative statement of materials set out in the foregoing affidavit of S. S. Ashbaugh.)

VIII.

Claimants at all times have held themselves in readiness and willing to comply with said contract dated July 12, 1906, in accordance with the drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, but have been prevented from so doing by the defendant, who insisted that said barges be erected strictly in accordance with the detailed specifications contained in Circular 310–C, and thereafter awarded the contract for the construction of said six steel barges to the Newport News Shipbuilding Company.

Respectfully submitted.

JOHN Q. THOMPSON,
Assistant Attorney-General.

S. S. ASHBAUGH,
Assistant Attorney.

In the Court of Claims of the United States.

CHARLES E. ELLICOTT AND JOHN B. Norris, copartners, trading as the Ellicott Machine Company,
v.
THE UNITED STATES.
No. 29907.

MOTION TO INCLUDE FORMER MOTION IN THE CERTIFIED RECORD.

Come now the defendants, by their Attorney-General, and move the court to include in the record to be certified to the Supreme Court of the United States on appeal herein the motion heretofore filed in this case and overruled on February 15, 1905, which said motion so overruled was to amend Findings VII and VIII heretofore made by the court and including the comparative tables of sizes and weights and percentages of reduction, as found on page 191 of the record as heretofore printed herein; which said motion should be so included in the record to be certified to the Supreme Court in order to give the Supreme Court a clear and correct understanding of the facts to be presented and in accordance with the provisions of Rule 1 in such cases made and provided.

JOHN Q. THOMPSON,
Assistant Attorney-General.

S. S. ASHBAUGH,
Assistant Attorney.

NOTICE OF SUBMISSION.

WASHINGTON, D. C., *February 26, 1910.*

To FRANCIS K. CAREY, JAMES PIPER, and A. A. HOEHLING, Jr., *Attorneys for Appellees:*

SIRS: You will please take notice that on Monday, the 7th day of March, 1910, a motion to remand the above-entitled cause to the Court of Claims, with directions to find additional facts, will be duly submitted to the Supreme Court of the United States for its decision, of which said motion and the affidavit in support of the same the foregoing are true copies.

Annexed hereto is a true copy of a brief in support of said motion.

Respectfully,

LLOYD W. BOWERS,
Solicitor-General.

Service of copy of the above-mentioned motion, affidavit, and brief, and notice of submission acknowledged this 26th day of February, 1910.

A. A. HOEHLING, JR.,
Attorney for Appellee.

BRIEF IN SUPPORT OF MOTION.

I.

As to the propriety of the motion.

The rules of this court provide that cases appealed from the Court of Claims shall be heard upon the following record and none other:

> 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.
>
> 2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.

When, however, the record thus made up fails to disclose some vital fact or facts, it is obvious that such defect must be remedied in order that this court may pass upon the case with proper knowledge of the facts. Accordingly, it was at an early day established in the case of *United States* v. *Adams* (9 Wall., 661), that in such a contingency the proper practice was to remand the case to the Court of Claims with direc-

tions to find such additional facts as were deemed necessary. There can be no doubt therefore as to the propriety, as a matter of practice, of a motion of this sort.

II.

As to the necessity for additional findings.

On this point little need be said. The present motion is submitted in company with a motion by appellee to dismiss or affirm and a brief in behalf of the Government opposing said motion. From that brief it appears that a finding upon the point first suggested in the present motion is essential to the proper construction of the writing sued on, while findings upon the other two suggested points are of vital importance in connection with the question whether or not the barges proposed to be constructed by appellees were so radically different from those specified in the advertisement for bids that a contract for their construction could not be deemed to have been made after competitive bidding. It is unnecessary to burden the court with a repetition of the argument on these points. It will be found under Divisions III, IV, and V of the stated brief.

It remains only to add that, as appears from the affidavit of Mr. Ashbaugh and the accompanying papers, the Government exhausted every effort to obtain findings on the stated points without success, although they are undisputed on the record.

LLOYD W. BOWERS,
Solicitor-General.

O

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 521.

THE UNITED STATES, APPELLANT,

versus

CHARLES E. ELLICOTT AND JOHN B. NORRIS, CO-PARTNERS, TRADING AS ELLICOTT MACHINE COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO DISMISS OR AFFIRM.

Come now Charles E. Ellicott and John B. Norris, co-partners, trading as Ellicott Machine Company, appellee, by their attorneys, and move the court to *dismiss* the appeal herein for want of jurisdiction, because the same was not applied for, taken and perfected within the time therefor allowed by law, as more fully set forth in the brief and argument hereto annexed.

And, in the event said appeal shall not be dismissed, appellee moves the court to *affirm* the judgment of the Court of Claims herein, upon the ground that, although the record

may show that this court has jurisdiction, it is manifest that the appeal was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

FRANCIS K. CAREY,
JAMES PIPER,
A. A. HOEHLING, JR.,
Attorneys for Appellee.

Notice of Submission.

WASHINGTON, D. C., *February* 5, 1910.

To the Attorney General of the United States.

SIR: You will please take notice that on Monday, the 28th day of February, 1910, motion to dismiss or affirm, of which the foregoing is a true copy, will be duly submitted to the Supreme Court of the United States for its decision thereon. Annexed hereto is a true copy of brief and argument in support of said motion.

Respectfully,

FRANCIS K. CAREY,
JAMES PIPER,
A. A. HOEHLING, JR.,
Attorneys for Appellee.

Service of copy of motion, brief and argument, and notice of submission acknowledged this 5th day of February, 1910.

LLOYD W. BOWERS,
Solicitor General.

BRIEF.

This case comes before this court upon motion made by appellee *to dismiss* the appeal taken by the United States upon the ground that it was not taken *within ninety days* after the rendition of judgment by the Court of Claims, for which reason it is contended that this court is without jurisdiction on appeal.

And, in the event said appeal be not dismissed, appellee moves the court *to affirm* the judgment of the Court of Claims, as provided by the rules and practice of this court.

Statement.

The appellee filed a suit in the Court of Claims on December 10, 1906, based upon a written contract dated July 12, 1906 (entered into August 17, 1906), with the United States for six steel dump barges for the Isthmian Canal Commission at the agreed-upon price of one hundred and one thousand four hundred dollars ($101,400) (R., 22-3).

The United States thereafter breached the contract, and the Court of Claims, upon trial had therein, entered judgment in favor of appellee and against the United States in the sum of ten thousand dollars ($10,000) (R., 22), and defendant has appealed to this court.

The Record.

In order that there may be a proper understanding of the motion to dismiss, based upon the question of jurisdiction on the grounds above referred to, it is both proper and important to have in mind the record of the several actions taken in the court below in respect to the entry of judgment and the appeal attempted to be taken by defendant. The following is the record of such several proceedings and actions:

December 10, 1906, the suit was filed in the Court of Claims (R., 1).

April 2, 1908, the cause was argued and submitted (R., 19).

May 18, 1908, final judgment was rendered by the Court of Claims and *entered* in favor of appellee and against the United States in the sum of ten thousand dollars ($10,000) (R., 26).

August 10, 1908, defendant filed motion for new trial (R., 26) (being eighty-four days after the date of the judgment).

November 23, 1908, said motion was argued and submitted (R., 26).

NOTE.—The new term of the Court of Claims began on December 7, 1908 (sec. 1052, R. S. U. S.).

January 4, 1909, the Court of Claims thus disposed of the motion for new trial: "Overruled" (R., 26).

January 21, 1909, defendant filed another motion *to amend* the findings of fact (R., 29).

February 8, 1909, said motion was argued and submitted (R., 29).

February 15, 1909, motion was overruled in part and allowed in part as to Finding VII (R., 29).

February 25, 1909, the United States made application for and gave notice of an appeal to the Supreme Court of the United States "from the judgment rendered in the above-entitled cause on the *fourth day of January, 1909*" (R., 29).

June 10, 1909, the appeal was allowed by the Court of Claims thus: "Ordered that the above application for appeal be allowed as prayed for" (R., 29).

The Motion to Dismiss.

From the foregoing statement it will appear that the final judgment in this case was entered by the Court of Claims on May 18, 1908; that on the eighty-fourth day thereafter the defendant filed a motion for a new trial; that the term at which said judgment was rendered and entered expired in December, and the succeeding and new term of the Court of Claims began on the first Monday in December, 1908 (sec. 1052, R. S. U. S.), and that on January 4, 1909, the Court of Claims overruled the motion for a new trial.

Instead of then filing an application for the allowance of an appeal from the final judgment that had been entered May 18, 1908, or doing so within the six days that then remained of the ninety days permitted by statute for the taking of such appeal (sec. 708, R. S. U. S.), it was not until February 25, 1909, that defendant filed formal application for the allowance of an appeal, and then, instead of applying for an appeal from *the judgment* in the case, it prayed an appeal from the judgment rendered by the Court of Claims on January 4, 1909, and the Court of Claims allowed the application for the appeal exactly in the form that it was prayed for.

There was no judgment of the Court of Claims dated January 4, 1909, since that was merely the *order* of the Court of Claims overruling the motion for a new trial, and, of course, an order overruling motion for a new trial is not appealable.

Thus it is that the record herein discloses, first, that an appeal in this case was not applied for by defendant within ninety days after the date of the judgment; and, second, that the appeal prayed for and allowed was *not* from the judgment that was entered in the case, but was merely from the order overruling the motion for a new trial.

In this connection, it is proper to particularly call atten-

tion to the fact that the order of the Court of Claims, passed January 4, 1909, overruling the defendant's motion for a new trial, did not in any way interfere with, change, or affect the original final judgment that had been entered in the case on May 18, 1908; nor did it undertake to re-enter or renew the judgment; the order of the court passing upon the motion for a new trial, as will be found in the record (R., 26), is found in the single word, "overruled."

The position of appellee in this case is that the final judgment was rendered and entered by the Court of Claims on May 18, 1908 (R., 26); that the application for an appeal should have been made by defendant within ninety days thereafter; that when defendant filed a motion for a new trial on the eighty-fourth day after the rendition and entry of judgment, it had the effect to *suspend* merely (and not to revive *de novo*), the furher running of said jurisdictional period of ninety days; and that when said motion was overruled, the United States had remaining six days within which to apply for the allowance of an appeal; and that having failed so to do within said period of six days, its right to the appeal was lost.

Attention has already been called to the fact that the record discloses that no appeal was prayed or allowed from the *final judgment* that was entered in this cause, namely, the judgment of May 18, 1908; and that the present appeal, which is taken from an *alleged* judgment of the Court of Claims of January 4, 1909, is, in fact, based upon a mere *order* of the Court of Claims of that date, overruling defendant's motion for a new trial.

It would seem to require no argument to establish that the only judgment from which appellant could properly appeal is the *final* judgment of the Court of Claims, and that no appeal will lie to this court from a mere order of the Court of Claims overruling the motion for a new trial; such order not being in the nature of a final judgment, and

its disposition resting entirely in the discretion of the trial court.

The law upon this subject is thoroughly settled and hardly needs citation of authority in its support.

In Kellogg *vs.* U. S. (19 Ct. Cls., 73), it was thus stated:

> "The denial for the motion of a new trial is not an interlocutory order, ruling, judgment, or decree within the meaning of the rules of the Supreme Court relating to appeals from the Court of Claims."

It may not be improper to here suggest to the court that the rules and practice of the Court of Claims in respect of motions for new trial, the entry of judgment, etc., provide a different procedure from that ordinarily obtaining under other jurisdictions, and also a different procedure from that obtaining under the common law practice. The usual practice in regard to motions for new trial is that the same are required to be filed within a short time, varying in different jurisdictions, from the rising of the court, on the day following, or within three or more days from the rendition of the verdict, etc.; pending the time for the filing as well as consideration and action upon which motion, no judgment is actually rendered or entered. In other words, ordinarily the motion for a new trial necessarily precedes (if made at all) the entry of judgment. The time within which an appeal must be taken, in respect of jurisdictions of the kind just mentioned, begins to run when the judgment is actually entered.

In the Court of Claims, however (rule 4, relating to appeals from the Court of Claims), it is provided that:

> "In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law thereon, in open court, *before or at the time they enter judgment in the case.*"

Further, rule 107, Court of Claims, provides that a motion for a new trial "must be made *at the term* in which the judgment is rendered."

Thus, in the present case, the Court of Claims rendered and actually entered its final judgment on May 18, 1908 (R., 26), and thereupon the time allowed for taking an appeal to this court, namely, ninety days, commenced to run, and that is the date for reckoning the time within which the appeal to this court must be governed.

Appellant could have filed at any time within ninety days thereafter an application for the allowance of an appeal, and such application would have temporarily *suspended* the further running of the time incident to the filing, consideration, and disposition of a motion for a new trial:

U. S. *vs.* Ayres (9 Wall., 609).

Roberts *vs.* U. S. (15 *Id.*, 384); rule 3, relating to appeals from the Court of Claims.

It is important to bear in mind the difference in respect of the practice obtaining in the Court of Claims and that obtaining in most other courts as to the relative order of motions for new trial and entry of judgment. Ordinarily, an appeal cannot properly be taken while a motion for a new trial is pending before the trial court; that being so because of the fact that, until such motion for new trial is disposed of, there would not ordinarily be any final judgment from which an appeal could be taken. As already explained, under the practice of the Court of Claims, it is permissible to file motions for new trial at any time *during the term* at which the judgment was entered. This court has heretofore ruled that so long as the application for an appeal from the judgment of the Court of Claims is *filed* within the statutory period of ninety days, it is immaterial whether it is thereafter actually *allowed* within or beyond said period of ninety days.

Thus it is, in practice, that not infrequently an application for the allowance of an appeal from a judgment will be filed along with a motion for a new trial, this for the purpose of having the application actually filed within the period of ninety days, and thereafter it is not formally presented for allowance by the court until the motion for a new trial is disposed of; nor is it material whether such application for appeal be filed prior or subsequent to the filing of the motion for a new trial, so long, of course, as the application for appeal is not actually *allowed* by the court until the motion for a new trial is disposed of.

As already remarked, defendant instead of applying for an appeal upon the overruling of the motion for a new trial on January 4, 1909 (R., 26), and within the time then remaining, waited a further period of some seventeen days and then filed another motion requesting certain amendments of findings of fact—this motion being filed in a different and succeeding *term* of the court from that at which the *final judgment* was entered. Such a motion was in effect a motion for a new trial and governed by the same rules (Neal *vs.* U. S., 14 Ct. Cls., 477, and Samson *vs.* U. S., 36 *Id.*, 194), and must be made at the same term at which the judgment was entered (Cambuston *vs.* U. S., 95 U. S., 287-8).

After the term of court during which final judgment was rendered had passed the court had no authority to alter, amend, or overrule its judgment, and could not consider any motions directed to it which had this end in view. Therefore, after the term had passed the judgment must stand, even though the court might have altered or amended the findings of fact. Of course, where a motion for new findings of fact or for a new trial is made within the term, the court may hand down its ruling thereon after the expiration of such terms and can in such ruling grant the new trial or amend the findings of facts as prayed. The court by granting a new trial could vacate its former judgment

or it could amend the findings of fact and re-enter the same judgment thereon, or it could amend the findings and let the judgment stand as and when originally given. But if the court fails to grant the new trial or make new findings, as requested, and overrules the motion therefor, as was done in this case, then the term having expired and the judgment having been rendered as a final judgment, and having been so entered up on the docket of the clerk upon order of the court, the judgment must be final and is not subject to any alteration by the court, but must stand as and when given as the final judgment in the suit. After the term has expired, the only right of the defeated litigant is to pursue his appeal to the higher court, provided, of course, that such appeal was duly and properly prayed for and granted. The Court of Claims, however, considered this second motion and added the last sentence to finding VII. This change was immaterial and in no way affected the previous judgment given by the court. The court having no authority to alter this judgment, did not attempt to touch it and did not order it re-entered or renewed either when the first motion was overruled or when the second motion was considered and acted upon.

When the first motion for a new trial and new findings of fact was overruled, the appellant's only remedy was through an appeal, and it is submitted that the Court of Claims was in error when it even considered the second motion made on January 21, 1909, for new findings. However, as the addition to finding VII was immaterial and as the original judgment was not changed or renewed or re-entered, the action of the court in considering this second motion has really no effect on the present controversy.

While it is true that decisions may be found containing the general statement that the pendency of a motion for a new trial, petition for a rehearing, and the like, will operate to *suspend* the running of the statutory period within

which an appeal may be taken, counsel have been unable to find any case where it has been held that such pendency of a motion for a new trial operates not merely to suspend the further running of time, but when overruled, *to revive de novo* the statutory period for appeal unless upon the overruling of such motion the court enters up a new judgment or re-enters the former judgment, in such sense that the action of the court at that time becomes the final judgment of the court for the purpose of review under proceedings in an appellate court.

As already remarked, the defendant in this case had ninety days within which to apply for an appeal from the final judgment of the Court of Claims that was entered May 18, 1908. On or about the eighty-fourth day thereafter it filed a motion for a new trial, the same being within the term at which the judgment was entered; that motion was argued at that term, but was not disposed of by the court until the next and succeeding term, January 4, 1909; and thereafter it would have been entirely proper for defendant to have filed its application for an appeal at any time within so much of the statutory period of ninety days as remained, giving due effect to the suspension of the further running of time occasioned by the pendency of the motion for a new trial from the eighty-fourth day, as above, to January 4, 1909.

It was not until February 25, 1909, long after the expiration of said period of ninety days, that defendant filed its application for appeal and then, too, as already remarked, it did not undertake to appeal from the final judgment, but only from the *order* overruling the motion for new trial.

If defendant's contention be correct, then it must of necessity result that defendant can wait until the statutory period of ninety days has almost expired, say eighty-nine days, for example (eighty-four days in this case), then file a motion for a new trial, which may be carried over to the

succeeding term; then when that is overruled, wait until a further period of almost ninety days has expired and file another motion (in this case the defendant waited for a period of seventeen days after the overruling of the motion for a new trial and then filed an equivalent motion), and so on successively, claiming that each successive action of this kind operates from time to time, when and as filed and disposed of, to absolutely revive *de novo* the statutory period of ninety days for the taking of an appeal.

The mere statement of the proposition would certainly seem to carry with it its own refutation, as it can hardly be deemed that it was ever intended to thus unduly prolong the right of appeal for the review of judgments of the Court of Claims.

The record in this case well illustrates the length to which a practice of that kind, if sanctioned, can be carried: Here the claimant, on December 10, 1906, applied to the Court of Claims for relief and redress in respect of the matters set forth in its petition; on May 18, 1908, the Court of Claims solemnly adjudged that claimant was entitled to recover from the United States the sum of ten thousand dollars ($10,000); that was followed by a succession of motions on the part of defendant, at long intervals, all of which resulted in a delay, from that date until February 25, 1909, and upwards of a year after the rendition of the judgment, before the defendant actually filed an application for an appeal, and it was not until June 10, 1909, more than a year after the judgment was rendered, that the application for the appeal was allowed.

To require an appellant to prosecute its rights within the statutory period in the manner hereinabove pointed out and as herein contended, would certainly impose no hardship upon the losing party; whereas, to support the contention made by defendant that, at its own pleasure, it may absolutely revive the entire statutory period of ninety days by

the filing of successive motions, is certainly contrary to the language of the statute and would impose a great wrong and an unnecessary hardship upon the rights of appellee, as so adjudicated by the court.

Motion to Affirm.

While, for the reasons hereinabove stated, it is respectfully submitted that the motion to dismiss this appeal should prevail, nevertheless, and in the event the court should decide herein that the appeal should not be dismissed, it is submitted that there is sufficient color and ground for the motion to dismiss, to authorize this court to entertain the motion to affirm the judgment below; and further, that the court is entitled to examine the record, and if it appears therefrom that the lower court was right on the merits, the judgment should be affirmed.

Whitney *vs.* Cook (99 U. S., 607);
Metcalf *vs.* The Alaska (130 *Id.*, 201);
R. R. Co. *vs.* Bristol (151 *Id.*, 555);
Douglas *vs.* Wallace (161 *Id.*, 347);
Ry. Co. *vs.* Carson (194 *Id.*, 136).

As was stated by this court in said case of Douglas *vs.* Wallace, *supra:*

> "While we are of the opinion that the claim of a Federal question thus presented is not so clearly frivolous as to authorize us to dismiss the case * * * we think there was such color for the motion to dismiss as authorizes us to proceed with the consideration of the questions involved.
>
> "Upon the merits we think the position assumed by the defendant is wholly untenable."

So, too, in the case of City of Chanute *vs.* Trader (132 U. S., 21[illegible]) the court cited with approval the case of Swope

vs. Leffingwell (105 U. S., 3), where it held that there was jurisdiction on appeal, but affirmed the judgment on the ground that "the case on the merits was governed by previous decisions."

So, too, in the case of S. C. Tryon (105 U. S., 267) the court overruled the motion to dismiss, but affirmed the decree on a consideration of the findings of fact.

It is submitted that a reading of the findings of fact set forth in the record in this case (R., 19-22) will disclose that there is no real or substantial question submitted for the review of this court.

The Court of Claims found that a valid contract existed between appellee and appellant; that the defendant (United States) breached the contract, and the court adjudged that, by reason of such breach, apellee was entitled to have and recover from the United States the sum of ten thousand dollars ($10,000).

It is a well settled doctrine of this court that the findings of fact of the Court of Claims are conclusive, and that the only question proper for review by this court is whether or not the conclusion of law thereon and the entry of judgment by the court in accordance therewith, is supported and justified by the facts as so found.

As already remarked, the court below has found a contract between the parties; has described its terms; has found that the defendant breached that contract; and it has made its finding as to the amount the appellee is entitled to recover from the United States.

Thus it would seem to necessarily follow that there is and can be no real or substantial question of law to be reviewed by this court.

The burden of the contention on the part of the defendant below was that the contract as entered into provided a barge of lighter construction than as specified in the original advertisement for bids; that is to say, a barge having the

same length, beam, draught, carrying capacity, form of construction, mechanism, etc., but being lighter in its framing and plates.

The record discloses that there were successive advertisements made by defendant for procuring these barges because of the fact that the bids were in greater amount than defendant desired to pay therefor. The present contract, under a bid which was satisfactory in price to defendant, was entered into, which, while not in any way departing from or changing the subject matter of the advertisement or specifications, provided for a barge lighter in framing and plates.

After the contract had been entered into and appellee had started the performance of its work thereunder, defendant apparently came to the conclusion that the barge contracted for would not be satisfactory, and so broke its contract and refused to permit performance by appellee.

The theory of defendant seems to be that the phraseology of the public advertisement for bids must be strictly and literally adhered to and followed, and that there can be no change or modification in any respect touching the details of the subject-matter of the advertisement and specifications, and that for this reason the barges contracted for were not the ones advertised for.

The advertisement simply called for proposals for furnishing and delivering six steel dump barges; hence no contention can be made by defendant that there was any departure in the contract from the subject-matter of the advertisement. The advertisement, in addition to describing the subject-matter, as just stated, required merely that "cuts and other descriptions of the barges offered should be submitted with bids" (R., 15-16). Attached to the advertisement were certain specifications which contained the statement that "a certain latitude in the details of construction will be permissible" (R., 16); and that "the following speci-

fications and requirements are general only as indicating the class of construction desired" (R., 16); and, furthermore, the specifications suggest what is "desired," not "required;" and "should" is used instead of "must" repeatedly throughout the specifications.

It would seem idle to contend that so long as the subject-matter of the advertisement and specifications be not departed from, there can be absolutely no modification or change in respect of mere detailed matters incident to such subject-matter.

> International Co. *vs.* U. S. (13 Ct. Cls., 209).
> McKee *vs.* U. S. (12 *Id.*, 504).

So, too, in the case of Garfield *vs.* U. S. (93 U. S., 242): The postoffice department had published a notice and advertisement inviting proposals for carrying United States mail between certain designated points; and the postmaster general accepted a bid covering an abridged distance. Subsequently, the bidder brought suit against the United States because of defendant's refusal to enter into formal contract with him, said suit being based on the theory that the proposal, bid, and acceptance constituted a valid contract. In that case it was objected that no valid contract had been entered into, among other reasons, because of a departure between the bid and the notice and advertisement—the bid and acceptance thereof being for an abridged distance, etc. This court held, however, that there was a valid contract; and, in speaking of the objection and contention urged by the United States, thus stated:

> "The object of the statute was to secure notice of the intended post-routes, of the service required, and the manner of its performance, that bidders might compete, that favoritism should be prevented, that efficiency and economy in the service should be obtained. It was not required that papers of this char-

> acter should be drawn, as if they were subject to the criticism or dissection of a demurrer in a court of law."

If the contention urged by defendant in the court below in this case were to be upheld, the result would certainly appear to be most harmful and injurious to the orderly conduct of the business of the United States, in that it would operate to absolutely prohibit and prevent the several departments of the Government from exercising any latitude whatever in respect of altering or changing mere matters of detail that enter into the subject-matter of advertisements and contracts entered into thereunder.

This matter was thoroughly considered in the court below, where the entire evidence was before the court and where it was able to intelligently comprehend and understand just how much force, if any, there was in the contention so urged on behalf of the defendant as to this matter of a change as well as the extent thereof in mere details of construction; and the court below decided that there was no merit in the contention, the opinion thus stating:

> "It seems unreasonable to us for defendants to insist that no modifications can be made by the parties to a contract in the details of the specifications submitted. Indeed, to make modifications of this kind is the rule rather than the excepuon. The purpose of an advertisement is to stimulate competition and to prevent favoritism. These barges, as a matter of fact, were advertised for three times, covering a continuous period of forty-two days; hence it cannot be claimed that it was not known among competitors that the United States desired to purchase six steel dump barges for use on the Isthmian Canal.
>
> "Considering again the whole case, no satisfactory reason having been offered, and no authorities cited as controlling, we reaffirm our former opinion in this case" (R., 28).

As was stated at the outset of this brief, in connection with the motion to affirm, it would seem to conclusively appear that the ultimate facts found by the court justify and sustain the conclusion of law of the Court of Claims and the judgment that it entered thereunder, and that there really is presented by this record no substantial question that can properly be reviewed by this court.

FRANCIS K. CAREY,
JAMES PIPER,
A. A. HOEHLING, JR.,
Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, APPELLANT,
v.
CHARLES E. ELLICOTT AND JOHN B. NORRIS, copartners, trading as Ellicott Machine Company. } No. 85.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

This case is pending here on a motion by appellees to dismiss the appeal or affirm the judgment of the Court of Claims, on a motion by the Government to remand the case to the Court of Claims for additional findings of facts, and on the merits.

That the appeal was taken in time is clearly demonstrated in the brief on file by the Government in opposition to the motion to dismiss; that the appeal is not without merit, and that the motion to remand the case to the Court of Claims for additional findings of facts should be sustained, will appear, we think, from a mere statement of the case.

17995—11

The case.

In April, 1906, the Isthmian Canal Commission was in need of six steel dump barges and advertised for proposals to furnish them. Only one bid was received, and so new proposals were called for, to be opened May 21, 1906. (R., 1.)

Two bids were now received, one for $35,000 for each barge, delivered at Panama, and the other by the appellees for $24,733.33 per barge, delivered at Baltimore. These bids were rejected. (R., 1.) What the specifications were upon which these bids were made is not shown by the record in this court. We think the fact should be found and reported by the Court of Claims.

A third time proposals were called for, to be opened June 8, 1906. This advertisement was accompanied by specifications which are contained in pages 16 to 19 of the printed record. Whether drawings accompanied these specifications is not clear, and the fact in this respect should be ascertained.

The specifications dealt with the dimensions of the barges, their carrying capacity, and draft and details of construction, and the materials to be used. The specifications are very precise as to the dimensions, and in some cases weight, of the steel plates, angle bars, bitts, etc., and timbers which are to enter into the construction of the barges.

Nothing is said of the weight of the completed barges except that they are to be "of heavy construction for rough service."

Bids were received as follows (R., 2):

Fore River Ship, etc., Co.	$50,000.00 each;
William Cramp & Sons	31,500.00 each;
Maryland Steel Co	27,950.00 each;
Marvel Shipbuilding Co	26,000.00 each;
Newport News, etc., Co	24,833.33 each;
Motley, Green & Co	22,750.00 each;
William E. Winant	18,500.00 each;
Ellicott Machine Co	16,900.00 each.

The bid of the appellees for $16,900 was for delivery at Baltimore and was for the barges according to the specifications, "with such modifications as are shown on drawing No. 2105, dated June 7th, submitted herewith." (R., 20.)

It was stated that "we make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and * * * we will furnish the articles specified at the prices and at the place, and in the manner, and within the time indicated in this proposal." (R., 21.)

The drawing 2105, of date June 7, 1906, upon which the proposal states the modifications are shown, is not contained in the record before this court, and manifestly it should be.

The petition states (R., 3):

> That said blue print No. 2105 so inclosed was exactly similar to blue print No. 2105, which was first filed with the bid of claimant June 7, 1906, except that said blue print inclosed with letter of July 27 contained the following words written on the face thereof:
>
> "SCHEDULE OF DISPLACEMENT, LOAD, AND DRAFT.
>
Capacity of bins, cu. yds	350
Displacement of hull as shown on 8'-0" draft line, 21,446 cu. ft., at 65 lbs. per cu. ft	1,394,000
350 cu. yds., total load, at 3,240 lbs. per cu. yd	1,134,000
Net weight of barge, including equipment	260,000 lbs."

But this is manifestly incorrect, as a reference to the drawing in the record, which will be found facing page 19, shows other notations which are in terms stated to be based on a letter of June 26, 1906. The only notation on the drawing which is undated, and may therefore have been on the drawing on June 7, is the following, which is found near the lower right-hand corner and above the number 2105, and is—

> **Note—**
> **Capacity of bins—350 cu. yards.**
> **Maximum loaded draft when carrying 350 cu. yds. of material weighing 3240 lbs. per cu. yard, not to exceed 8′–0″.**

It is important to know the terms of the proposal made by appellees, and these are not shown by the findings of the Court of Claims.

The notation quoted above on its face modifies the specifications only by fixing the capacity of the barges at 350 cubic yards. The specifications provided for "not less than 350 nor more than 400 cubic yards." (R. 16.) The draft was stated at 8 feet alike in the notation and specifications.

It is not apparent that the weight and dimensions of materials for the construction of the barge, as set forth in the specifications, are modified by the notation.

June 14, 1906, the Commission wrote to appellees, inclosing drafts of contracts to be signed. This was not answered until July 16, 1906. (R., 2, 3.)

June 26, 1906, the Commission's engineer, Mr. Maltby, wrote to Mr. Ross, the purchasing agent, as follows (R., 13, 14):

Mr. D. W. Ross,
General Purchasing Officer, I. C. C.,
Washington, D. C.

DEAR SIR: I am returning to you herewith, the papers received in connection with bids for dump barges. I send you a small sketch showing the desired arrangement of the hinges on the hopper doors, and the method of securing timber lining to hoppers.

It is noted that the drawing submitted by the Ellicott Machine Works does not show any details as required by the specifications. It is presumed, however, (and we should insist on it) that the framing will be in strict accordance with our specifications. Their drawings show three hoppers, each 20 ft. long, but a small sketch shows the chains attached to the doors at the centre of each hopper, as well as at the ends, and this should be done. Chains supporting the doors should be attached to them at least every ten feet. The arrangement for hoisting the doors should be such as will enable us to drop them readily, through the use of a clutch of some sort. This is a very ordinary method, and it is only mentioned so that there may be no misunderstanding about it.

The sketch which I enclose is suggestive only, and may be varied in detail as the manufacturer desires; the requirements only being that the hinge on the door should be heavy and thoroughly bolted to the door; that it should be placed in such a position that when the door is dropped it will not pinch on the sides of the opening; and furthermore, that they

will be secured by links to the fastenings on the sides of the hopper, above the light water line. The purpose of this arrangement is to enable us to pull up the doors, repair them and their hinges without docking the barge.

According to our specifications all of these details should have been furnished by the bidders with their proposal, and would have been approved or disapproved when accepting their bids. I am willing, however, to waive this point, provided they are willing to build these details in the way which it was intended to cover in the specifications.

Yours, very truly,

(Signed) F. B. MALTBY,
Division Engineer.

This letter was communicated to appellees, and indeed was made a part of the contract.

It is to be observed that this letter contains no suggestion of a radical or indeed any change in the weight of the barge or wide departure from the specifications, and on the other hand states as to the drawing that "it is noted that the drawing submitted by the Ellicott Machine Works does not show any details as required by the specifications. It is presumed, however (and we should insist on it), that the framing will be in strict accordance with our specifications."

On July 16, 1906, the appellees wrote to Ross, the purchasing agent, and as to this letter the record quotes and states as follows (R., 3):

"We have your favor of June 14th, 1906, with enclosures as noted. In order to correspond with our proposal of June 7th, 1906, Article I should read as follows:

"Article I. That the said Ellicott Machine Company shall construct, erect and deliver to the Isthmian Canal Commission, at Baltimore, Maryland, six steel dump barges in accordance with specifications contained in circular No. 310–C of the Isthmian Canal Commission, dated May 29th, 1906; with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and subject to such amendments as to details of hinges hoisting gear and method of securing timber lining to hoppers, as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract."

Said letter further says that "our drawing No. 2105 was not intended to show working details, but solely to limit the conditions of displacements, load, and draft. As long as these are maintained we shall be pleased to follow such reasonable design of working details in arrangement and distribution of material as Mr. Maltby or his inspector may require." And the letter further says, "We return contracts."

There is in this letter no statement of the weight of the barge when completed and no suggestion that the specifications as to dimensions of material are

abrogated by the notation on the drawing of the loaded draft of the barges.

On July 27, 1906, the appellees wrote to Engineer Maltby as follows (R., 12, 13):

> F. B. MALTBY, *Division Engineer*,
> (Through D. W. Ross, General Purchasing Officer, Isthmian Canal Commission),
> *Washington, D. C.*
>
> DEAR SIR: In accordance with our verbal request of D. W. Ross, general purchasing officer, in connection with our bid June 7th we submit print #2105 revised July 27th, specifying details as called for in your letter June 26th, 1906, of hinges, hoisting gear and method of securing timber lining to hoppers.
>
> We have also inserted on the drawing a schedule of displacement, load and draft showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire. It has been the custom on previous similar contracts, the total weights and general design being clearly specified and defined in the contract to get out the working details under the supervision of a representative of the contracting officer as soon as possible after the execution of contract.
>
> We shall be very glad if this contract can be awarded at once as the season is approaching in which such work cannot be advantageously prosecuted.

We take this opportunity to call your attention to the bid of the next lowest bidder, Winant of Brooklyn, N. Y.

A schedule of displacement on this bid will show as follows:

Displacement of hull as shown on maximum permissible draft line of 8′-0″—20,263 cu. ft. at 65 lbs.	1,317,095 lbs.
Deduct weight of minimum permissible load—350 cu. yds. at 3,240 lbs.	1,134,000 lbs.
Net weight of barge including equipment..	183,095 lbs.

From the above you will note that we are offering about 80,000 pounds more material on each barge than our competitor at about $1,000.00 less per barge.

Respectfully,

ELLICOTT MACHINE COMPANY.

This letter was attached to the contract, and pursuant to it the notation was made at the top of drawing No. 2105, as follows:

Revised July 27, 06.

Accompanying letter of Ellicott Machine Co. to F. B. Maltby July 27, 06.

Details of hinges, hoisting gear, and method of securing timber lining; to be constructed as described by letter of F. B. Maltby, Division Engineer, dated June 26, 06.

Schedule of Displacement

Load and Draft.

Capacity of bins, cu. yds.	**350**
Displacement of hull as shown on 8′-0″ draft line, 21446 cu. ft. at 65 lbs. per cu. ft.	**1,394,000**
350 cu. yds. total load—at 3240 lbs. per cu. yd.	**1,134,000**
Net weight of barge including equipment.	**260,000 lbs.**

The letter of July 27, 1906, states that the schedule of displacement, load and draft shows a total net

weight for the barge of 260,000 pounds, and "that this corresponds with the note shown on print originally submitted with bid;" but still no statement that the specifications as to dimensions of material have been abrogated.

This seems to have been the end of the correspondence leading up to the execution of the contract.

The contract itself is dated July 12, 1906 (R., 8), and was evidently framed in accordance with the suggestions of appellees' letter of July 16, 1906, for Article I of the contract follows almost literally the suggestions of that letter, saving the reference to the letter of July 27, 1906, as will appear by comparison.

Article I as suggested by appellees July 16, 1906 (R., 3):

> "That the said Ellicott Machine Company shall construct, erect and deliver to the Isthmian Canal Commission, at Baltimore, Maryland, six steel dump barges in accordance with specifications contained in circular No. 310–C of the Isthmian Canal Commission, dated May 29th, 1906; with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and subject to such amendments as to details of hinges, hoisting gear and method of securing timber lining to hoppers, as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract."

Article I as contained in contract (R., 8):

> Article 1. That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310–C of the Isthmian Canal Commission, dated May 29th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, *and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906*, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with accompanying sketch, copy of which specifications, drawings, letters, and sketch are attached hereto and form a part of this contract.

The specifications as to dimensions of material were, however, set forth in the contract in all their details as originally prescribed in the advertisement calling for bids.

The contract containing the specifications, the letter of Maltby to Ross of June 26, 1906, the letter of appellees to Maltby of July 27, 1906, and the drawing No. 2105, with the notations thereon, was on August 17, 1906, signed by the appellees, and on August 28, 1906, a draft duly signed was delivered by the Commission to the appellees.

Controversy over the meaning of the contract arose immediately.

On August 30, 1906, appellees prepared "an itemized list of materials covering the six barges and distributing the total weight of 260,000 pounds in the best possible manner," according to their judgment. This was sent to Ross, and at his request was on September 1 sent to T. M. Post, the Commission's inspector of dredges. Post wrote to appellees on September 8 that he had been directed to withhold approval of the bill of materials, and had forwarded it to Maltby, and on September 14, 1906, appellees were advised that Maltby had cabled: "Insist Ellicott follow our specifications as to framing and plates on barges." (R., 5.)

In answer to this appellees wrote to Ross September 15, 1906, that they were willing to return to the original specifications as to framing and plates, but that this would decrease the displacement to some extent, and consequently the carrying capacity of the barges, *otherwise the weight of the barges would exceed the total called for in the contract, namely, 260,000 pounds.* They further suggested that the specifications as to framing and plates could be carried out and at the same time the same capacity, as shown on drawing No. 2105, maintained if the cost of the additional material was covered by a supplementary contract. (R., 5.)

The Commission insisted upon observance of the specifications, and the appellees refusing compliance, the contract for the barges was awarded to another party.

The evidence before the Court of Claims showed that the difference between the parties was a radical one. The weight of a barge, if constructed according to specifications, was put by Mr. Ellicott himself at 425,000 pounds. No witness put it below this. Some estimates put it at 450,000 pounds. The difference in weight alone at the lowest estimate involved a reduction from the specifications of 38.8 per cent. This fact should have been found and reported by the Court of Claims.

Reference to page 4 of the motion for additional findings of facts will show what the difference signified as to details of construction. In 21 items of materials there was a reduction in weight in the bill of materials submitted by appellees from the call of the specifications of from 19 to 54 per cent. This fact was important, and should have been found and reported by the Court of Claims.

The Court of Claims stated in its opinion that the barges as appellees intended to construct them were in their principal component parts or members "reduced in strength as well as in weight, durability, size, and power of resistance." (R., 23). In short, the little, obscure notation of June 7, 1906, in drawing No. 2105, absolutely obliterated the specifications as to weight and dimensions of all materials entering into the construction of the barges.

The representatives of the Commission in executing the contract were evidently not conscious of this, and believed throughout, and until the list of materials came in, that the specifications would be met in

the construction of the barges. However this may be, if the contract is taken to be what the claimants insist it is then the contract was let without advertising and without opportunity for competitive bidding, since nobody was invited or had a chance to bid on such barges as the claimants proposed to construct.

In either view there was no valid contract, and the appellees were not entitled to recover.

Both propositions are argued in the Government's brief in opposition to the motion to dismiss or affirm, and it is not proposed to elaborate the argument.

This brief has been filed in order to present a consecutive narrative of the facts underlying the controversy between the parties.

In further support of the proposition that the Commission had no authority, without readvertising, to enter into a contract for barges of a radically different type from those originally specified, we cite:

Fones Hardware Co. v. *Erb*, 54 Ark. 645;
Mazet v. *Pittsburgh*, 137 Pa. St. 548;
Chippewa Bridge Co. v. *Durand*, 122 Wis. 85;
Packard v. *Hayes*, 94 Md. 233;
Detroit Free Press Co. v. *Auditors*, 47 Mich. 135;
Littler v. *Jayne*, 124 Ill. 123.

Respectfully submitted.

F. W. LEHMANN,
Solicitor General.

NOVEMBER, 1911.

○

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 85.

THE UNITED STATES, APPELLANT,

vs.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, CO-PARTNERS, TRADING AS ELLICOTT MACHINE COMPANY, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR APPELLEES.

Five briefs have been heretofore filed in this case, as follows:

Brief No. 1:

Motion to dismiss or affirm and brief in support thereof (filed by appellees).

Brief No. 2:

Brief in opposition thereto (filed by United States).

Brief No. 3:

Motion for additional findings of fact and brief in support of same (filed by United States).

Brief No. 4:

Reply brief (filed by appellees).

Brief No. 5:

Supplemental brief for the United States.

The filing of these various briefs and motions, together with the extraneous matter introduced into the record by the appellant, may lead to some confusion, and this brief is filed for the purpose of stating what in the opinion of counsel for appellees is now before this court for consideration.

Matters now open for review are grouped herein under four headings:

I.

Statement of the facts of the case as shown by the record.

These facts may be briefly summarized as follows:

After three separate advertisements by the Isthmian Canal Commission asking for proposals on six steel dump barges, covering a period of about two months, the said Commission accepted the bid of appellees, which was the lowest, to construct said barges.

Appellees' bid, together with seven others, was opened on June 8, 1906.

Appellees' bid apparently was not thoroughly understood by the Government officials, and numerous conferences were

had and letters passed between the various employees of the Government and the appellees for the purpose of explaining just what appellees proposed to furnish under its bid. These various matters, only some of which are referred to in the record, occupied some time, and it was not until August 17, 1906, that the contract which is in suit was entered into.

After the contract was executed and delivered, appellees were prevented from performing it because the Government employees, or some of them, thought that the specifications covering the barges, which specifications were made part of the advertisement and were also made part of the contract, should be literally carried out by appellees; wheeras, by the terms of the bid and contract, these specifications were modified so that the barges, while in all other respects similar to the ones detailed by the specifications, would when constructed be lighter in framing and plates.

This suit is the result of the refusal of appellant to allow appellees to construct the barges in conformity with the bid and contract.

With all the letters, testimony of the various interested parties, as well as the testimony of experts before it the Court of Claims decided the case in favor of appellees, and gave judgment on May 18, 1908, for ten thousand dollars ($10,000) against the United States.

The Government officials set up as a defense to the action that they did not understand appellees' bid nor the contract based thereon, and, charging fraud, misleading conduct, misrepresentation, etc., attempted to escape liability. The Court of Claims decided in most positive manner that there was no fraud, misrepresentation, nor unfair or unconscionable dealing on the part of appellees, and that there was no mutual mistake as to the subject-matter or terms of the contract, and that appellant is liable.

The Government finds itself in its present position as a result of lack of cohesion or co-operation in its various de-

partments having charge of this contract. We have, *first,* Mr. Shonts, chairman of the Commission, giving very little thought to the details of the office in respect to minor contracts such as this; *second,* Mr. Maltbie, the engineer, who was out of touch with the situation owing to the fact that he was located on the Isthmus of Panama, and, *third,* the man who had charge of the whole matter, Mr. D. W. Ross, general purchasing agent, located at Washington.

It may be admitted for the purpose of argument that there was a misunderstanding amongst these three gentlemen as to the exact character of the barge that the bid and contract called for. The striking point, however, is that Mr. Ross, who conducted the negotiations with the appellees, was not put on the stand by the Government, and, therefore, it cannot be claimed that he did not know exactly what were the modifications made in the specifications by appellees' bid and set out in the contract. As to the other two gentlemen, the Court of Claims has held, substantially, that if they did not know it was their own fault, as appellees did everything in their power to make their bid clear.

The manner in which the specifications were modified by bid and contract may not be entirely clear from the record alone, but whether these modifications were clear or made clear by appellees is a question of fact to be found and which was actually found by the Court of Claims, with all the testimony before it. The Court of Claims has decided that the modifications were clearly expressed and should have been understood by the Government employees; and, furthermore, that they were not radical and did not constitute a substitution of one thing for another.

II.

The motion to dismiss the appeal should be granted, because the same was not taken from the final judgment of the Court of Claims, and because it was not made within ninety (90) days from the rendition of the final judgment in the Court of Claims.

The motion to dismiss has been fully briefed and authorities noted, and nothing further need here be said.

See Brief No. 1, pages 1 to 13.
Brief No. 2, pages 8 to 16.
Brief No. 4, pages 26 to 29.

III.

Appellant's motion to remand the case for additional finding of fact should be dismissed, and the affidavit of S. S. Ashbaugh and the annexed overruled motions made in the Court of Claims should be stricken from the files.

The above propositions have been fully briefed, and further comment is unnecessary.

See Brief No. 4, pages 1 to 17.
Brief No. 3, pages 1 to 16.

Counsel for appellees have also set out the reasons why the other propositions contained in appellant's brief No. 2 are not properly open for consideration by this court.

See Brief No. 4, pages 23 to 30.

This leaves as the only remaining proposition to be considered the question of the departure of the bid and contract based thereon from the specifications accompanying the advertisement, and it is respectfully submitted—

IV.

That the Isthmian Canal Commission has authority in law to make a valid contract the terms of which modify the exact terms of specifications accompanying an advertised circular asking for proposals for work and materials.

It is apparent that the defense made by the Government to appellees' claim is an extremely technical one. It is not based on equity or business fairness, and would not be open to a private individual or a private corporation.

Ordinarily an agent acting within the apparent scope of his authority has the right to bind his principal. Ordinarily when the sovereign power comes down from its position of sovereignty and goes into the market to barter and contract it is treated just like any other contractor.

Ordinarily, the citizens of the United States have a right to expect as fair business treatment from their sovereign as they might expect from other citizens. The defense here set up goes counter to these various propositions, and in order that it may be availed of successfully, there must unquestionably be a clear case, coming exactly within the terms of the exception to the general rule.

The exception to the general rule may be stated as follows:

Government, State, and municipal authorities act through ministerial agents elected or chosen by the people. In making contracts for work for the sovereign they are usually limited in their authority. Such limits are shown by the laws of the jurisdiction within which they are acting. A citizen in dealing with these ministerial agents is presumed to know the extent of their authority as defined by the laws under which they are acting and is presumed to know that they cannot exceed their defined authority. If the citizen enters into a contract beyond the power of the minis-

terial agent to make, he must suffer, rather than the community at large, who if said contract was upheld would suffer from the unauthorized acts of its agent.

As a corollary to this proposition, it may be stated that a statutory requirement, authorizing ministerial agents to make contracts for work and material, only after public advertisement, and then only to the lowest responsible bidder, makes a limitation on said agents' powers which comes within the above enunciated principal, and a contract not made in conformity with such statutory requirements is void.

The reasons given for public advertisement and awarding the contract to the lowest bidder are stated by Dillon as follows:

> Dillon Municipal Corp. (5 Ed., 1911), sec. 809:
>
> "The purpose of a statute requiring the letting of bids to the lowest bidder is to invite competition, and to that end publicity of the intention to let the contract is of the essence of the proceeding. Hence, any *statutory proceedings requiring* advertisement, or specifying its nature, are usually to be regarded as *mandatory,* and a failure substantially to comply with their requirements is sufficient to avoid the contract. When the statute does not prescribe the time or the method of advertisement these matters are left to the discretion of the city council or of the board entrusted with the duty of making the contract."

And, again in section 802:

> "In discussing the nature of contracts which are excepted from the operation of statutes requiring competitive bidding, the court has said that the purpose of the statute is to insure economy in the public administration, and honesty, fidelity, and good morality in the administrative officers."
>
> "Competitive offers or bids have no other object but to insure economy and exclude favoritism and corruption in the furnishing of labor, services, prop-

> erty and materials for the uses of the city. This is the only purpose of the statutes, and when this effect is given them nothing further is needed."

This brings us to the discussion of the points which in the opinion of counsel for appellees clearly differentiate the present case from those cases set up by appellants.

First. Appellees must be charged with notice of the limitations existing in respect to the power of the Government agents to contract through some law, statute, ordinance, etc.

In the present case there was no statute requiring the Isthmian Canal Commission to advertise for bids and to award contracts to lowest responsible bidder.

(*a*) The Isthmian Canal Commission was created by act of Congress approved June 28, 1902, entitled "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific Oceans" (32 Stat., 483). Under this act the Isthmian Canal Commission was organized, and the seven members were appointed by the President. While said Commission was made "subject to the direction and control of the President," it was given full authority to proceed with the building of the canal and the purchase of all necessary supplies, machinery, etc. The act contains no requirement for advertising for the work, machinery, or supplies, nor the awarding of the contract to the lowest bidder in any case. Therefore, as far as any statutory notice of any limitations in the powers of the Commission is concerned, the appellees had none, for none was made. The Commission was given the broadest powers possible, and, apparently, any contract made by it, no matter how made, in connection with the construction of the canal, was valid and binding.

(*b*) It is true that the President, by a communication addressed to the Commission on April 1, 1905 (and which is found on page 483 of the Proceedings of the Isthmian Canal Commission), and, as far as we know, nowhere else,

stated substantially that contracts shall be made by the Commission only "after due public advertisement in newspapers of general circulation, and shall be awarded to the lowest responsible bidder." It is also true that in response to this direction of the President, the Commission adopted a set of resolutions found on page 492 of said Proceedings of the Isthmian Canal Commission which embodied the same language in regard to letting contracts as contained in the President's communication.

It must be apparent, however, that these resolutions passed by the Commission could be altered by the Commission. They have not the binding effect of a statute defining and limiting the powers of the Isthmian Canal Commission, and should not be considered as equivalent to a statute or law of which the public is presumed to have knowledge. They correspond to resolutions of directors or by-laws of a private corporation of which the public has no notice and are not comparable to a duly recorded charter which gives notice to all the world.

Not only this, but, granting that the appellees were charged with notice of the resolution, it is certainly very general in its terms. No time for advertising is mentioned nor what the advertisement should contain, which certainly indicates that the Commission did not intend to restrict itself, and has left to itself a large discretion, large enough without question to cover the present case, namely, a modification of its specifications after the same have been advertised.

When we compare the powers of the Commission in this respect with the limited powers of municipal agents awarding contracts under city charters or municipal ordinances, it is apparent that the many cases cited by appellant cannot be taken as conclusive of this question. Counsel for the Government are evidently aware of the weakness of their position on this point, and in Brief No. 2, page 24, have referred to section 3709 of the Revised Statutes. This section, however, does not impose the necessary limitations

required to support the Government's contention, as the awarding of the contract is not limited to the lowest bidder. Nor does the joint resolution referred to on page 25 of Brief No. 2 control, as this was not approved until June 25, 1906, and the advertising was made prior to June 8, 1908, and the bid made on that day. This ace does not call for an advertisement at all, and furthermore cannot be considered as retroactive and made to cover advertisements and bids made previous to its passage.

Second. The Isthmian Canal Commission are not "ministerial agents," comparable to agents acting for a city or State in carrying out a defined piece of work in a limited and defined manner.

It was optional with the Commission whether it ordered the barges at all. It did not by law have to buy these particular barges. The kind of barge desired was absolutely in its discretion. This illustrates the difference between the Commission and its limitations and the ordinary State or city agency directed by law to do a particular piece of work in a particular way and their limitations. In other words, the Commission has much broader powers, a much greater discretion, and is much less hampered in the exercise thereof than the ordinary State or municipal agent. This discretion is certainly broad enough to cover a change in the weight of a barge from that advertised.

Third. The question as the record stands in this court is in reality a question of fact.

There are two matters to be determined, and both have been decided by the Court of Claims in favor of the appellees:

(*a*) Was there a sufficient advertisement to promote economy, and was there any fraud or collusion?

(*b*) Was the modification material, so that the barge contracted for was not advertised?

These are not questions now open for review. The Court

of Claims has decided positively that there was more than a sufficient advertising to promote economy, and the bids themselves on the face show this result. The Court of Claims has also decided that there was no fraud or collusion and that the bid was fairly made and fairly accepted by the Government officials.

The Court of Claims has also decided that the modifications made by the bid and contract did not cause a substitution of something else for that which was advertised; that in all essential features the bid and contract followed the specifications, and that the modification was well within the powers of the Commission to make. These certainly are questions of fact and not questions of law. This court must confine its attention to what is properly in the record. The only fact on this point in the record is found in finding VII, which states that the component parts of the barge were reduced in strength and weight as compared to specifications, and this is qualified by Judge Atkinson in his opinion, when he holds that the reduction was an immaterial modification.

Practically the entire argument of counsel for appellant on this point is based on matters and facts not properly in the record.

Fourth. The convenience of the situation requires that the Government officials should be allowed some latitude to modify specifications annexed to advertisements when the contract is made and also to modify a contract after it is made.

If this court decided that after an advertisement was started no change could be made from its terms either when the contract was made or after it was made and the work started, without readvertisement and the awarding of a new contract, the business of the Government would come absolutely to a standstill.

The Government is contending for a decision which will

make it impractical to carry on its business. Modifications are the rule. It is common knowledge that it is impossible to frame plans and specifications on large and important works, so that the whole work can be carried through without any change. Another point for consideration is that the claim here asserted is made by the Government itself and not by a disgruntled bidder or a taxpayer, as is the case in most cases involving the question under discussion. The Government is pleading a technical disability contrary to what might be called the good business faith of the situation, and, like all pleas of this character, it is necessary that the disability complained of should be clearly established.

Fifth. Authorities.

There is a dearth of cases which can fairly be taken as analogous to the present case.

The case of Harvey *vs.* United States is somewhat nearer to the present case than any other case stated in the various briefs. This case was heard four times in the Court of Claims and twice in this court, as follows:

8 C. C., 501; 12 C. C., 141; 13 C. C., 322; 105 U. S., 671; 18 C. C., 470; 113 U. S., 243.

There the contractors, in response to an invitation for proposals for bridge work, bid on one part of the work, as they had a right to do under the terms of the advertisement. Through mutual mistake, the contract was drawn covering the whole work, and making several other important changes not in accordance with contractors' bid.

One of these changes allowed the Government to reduce the amount of the work from the plans and specifications advertised, and the contractors claimed the right to recover loss of profits on account of this reduction.

The point was made, although not specifically passed on, that the Government officials had no right to change the

contract from advertised specifications. The Court of Claims, however, upheld the contract, and only awarded damages allowable under the terms of the contract.

The claimants, realizing that the case was one for equitable relief, and that a court of equity could and would reform a contract entered into by mutual mistake, got a bill through Congress giving them the right to again present the case to the Court of Claims, and giving this court the right to adjudicate the case on equitable grounds.

At the trial of the first case it is apparent that claimants could have made the defense that the contract was not awarded as advertised, and was therefore void, if such a defense had been legally possible. By this means they could have thrown the contract out and then been able to assert that the real contract was to be found in the proposal and accepted bid.

While it is not clear that this point was made, still the court held that the contract, even though it was different from the bid and proposal, was valid and binding on the parties, and this was further emphasized later when the Court of Claims held that the contract was not subject to reformation, because the mistake in its terms was not the result of a mutual mistake. But this ruling was reversed by the Supreme Court, as the Supreme Court held that there had been mutual mistake.

The Supreme Court apparently adopted the lower court's theory that the contract was not invalid on account of a departure from bid and specifications, but did hold on equitable grounds that it should be reformed on account of having been entered into by mutual mistake.

Respectfully submitted,

FRANCIS K. CAREY,
JAMES PIPER,
A. A. HOEHLING, JR.,
Counsel for Appellees.

FILED
MAR 7 1910
JAMES H. MCKENNEY
Clerk

SUPREME COURT OF THE UNITED STATES.

[illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 521.

THE UNITED STATES, APPELLANT,

vs.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, CO-PARTNERS, TRADING AS ELLICOTT MACHINE COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF OF APPELLEE TO BRIEF AND MOTION OF APPELLANT.

The position assumed by the appellant herein is of a character calling for reply, as well as protest, against the manner of presenting to this court, in an entirely *ex parte* manner, alleged facts that are not in the record, and then attempting to fortify its position on the merits by assuming such alleged facts, outside of the record, to be facts proved below and undisputed.

Appellant, having thus brought to the attention of this court an entirely unauthorized *ex parte* showing, proceeds to contend upon the premises so erected, that the solemn judg-

ment of the Court of Claims is lacking in merit on the facts and erroneous in law.

The method employed by appellant in filing motion for additional facts, accompanying the same by an *ex parte* affidavit undertaking to state what is the *undisputed* evidence in the court below, and attaching thereto copies of certain motions made in the court below, and then treating all these matters as part of the record in the case, would seem to be as lacking in precedent as it is improper.

The necessary effect of the position here assumed by appellant is to ask this court to weigh what appellant assumes the evidence below to have been, and then to have the decision herein reviewed, not upon the ultimate facts found by that court, as by law required, but upon the evidence alleged to be found in the record below.

In closing the brief in support of its motion, appellant states:

> "It remains only to add that, as appears from the affidavit of Mr. Ashbaugh and the accompanying papers, the Government exhausted every effort to obtain findings on the stated points without success" (p. 16).

This sentence is completed as follows:

> "Although they are undisputed on the record" (p. 16).

To this latter statement counsel for appellee take most positive exception, and insist that the Court of Claims, in its findings of ultimate facts, has found every fact in any way essential to a fair understanding of this case; and that the facts now requested were not found by the Court of Claims in the manner now insisted upon by the appellant, because the evidence did not support them and, further, because they were deemed immaterial to the issues involved.

Counsel for the Government, at the time of its motion for a new trial; again in its motion for new findings of fact, and,

finally, in motion to include in the record on appeal the several motions now annexed to said motion to remand this case for additional findings of fact, requested the Court of Claims to put in this record, either as ultimate facts or as part of the record on appeal, substantially the additional facts it now requests. This the Court of Claims, after the fullest consideration and with the testimony all before it, refused to do.

Failing in that attempt, counsel for appellant, by filing the present motion, affidavit, and annexed motions and briefs, have now done exactly what the Court of Claims refused to allow.

Counsel insist that appellant has no right to urge upon the consideration of this court matters that are outside of the record, and yet, in opposing the showing made by appellant, it is necessary to make some mention of what is or is not shown by the record below, to the extent that such matters are here relied upon by appellant, lest by silence counsel be deemed to acquiesce in the Government's contentions.

Motion for Additional Findings of Fact.

I.

It is entirely immaterial to the issues involved in this case whether or not the officers of the Isthmian Canal Commission knew what was in the contract made with the appellee when the same was signed. The Court of Claims (R., 21-22) has found that the contract was properly entered into between the United States and the appellee, and that it was a valid and binding contract. Quoting from the opinion of Judge Atkinson:

> "The litigation in this case resulted from what seems to have been an apparent misunderstanding by the agents of the defendants," etc. (R., 23).
>
> "The findings fail to reveal misrepresentation and fraud by claimants, but reveal a degree of negligence on the part of the agents of the defendants from

> which they cannot be allowed to extricate themselves by the abrogation of a duly executed contract in order to shield themselves from responsibility" (R., 25).

The conclusion reached by the Court of Claims was, not whether or not the officers of the Government knew what was in the contract, but if they did not know, then it was due to their own negligence and not to any fault of appellee.

Quoting again from Judge Atkinson's opinion (R., 25):

> "When a contract is duly signed prior negotiations become merged in it, and to ascertain the intention of the parties thereto we must look to the contract alone. If the parties to a contract have reduced it to writing, they must intend such writing to be the repository of their common intentions. It merges all prior and contemporaneous negotiations. Extrinsic evidence is inadmissible in an action on a written contract to show the understanding of the meaning and effect of such contract entertained by one or both of the parties thereto when the contract was entered into (Page on Contracts, sec. 86, 1189, 1193).
>
> "If a party to a contract is able to but does not read it, then he is negligent, and cannot plead this negligence in his defense. 'Some courts lay it down as a broad principle that one who enters into a contract under mistake of fact due to his own negligence, concerning which he could with reasonable diligence have learned the truth, cannot have relief' (Page on Contracts, sec. 80).
>
> * * * * * * *
>
> "Page on Contracts, section 79, further says:
>
> "'Every sane person is held to intend the legal consequences of his voluntary acts. Accordingly, if a person of legal capacity and not acting under fraud, misrepresentation, duress, or undue influence goes through the outward form of binding himself by contract, he cannot avoid liability thereon by claiming that unknown to the adversary party he made his offer or acceptance under mistake of fact, and that he did not intend to make such offer. A mistake of this kind (*i. e.* mistake as to the subject-matter

> of the contract) is generally inoperative, because parties are bound by what they say and do, and the courts will not consider what they think and believe, in the event of a difference between the two. If an article bought does not possess the qualities attributed to it by the purchaser the case is governed by the maxim *caveat emptor*, unless the seller has caused the mistake by his fraud or unless there has been a warranty.'"

After the reargument of this case in the Court of Claims on motion for new trial the court handed down another opinion by Judge Atkinson (R., 26-27-28), which reaffirmed and approved the doctrine laid down in the previous opinion.

There is enough in the record to show that the negotiations leading up to the execution of the contract now in suit were conducted by D. W. Ross, general purchasing agent of the Isthmian Canal Commission; that the contract was in fact prepared in his office, and that it was with him that the appellee had the various interviews and correspondence, etc., relating to this contract. And it may be remarked that inasmuch as the Government failed to put Mr. Ross on the stand, it will be impossible for the Court of Claims to state what Mr. Ross understood or "knew before or by the time of the execution of writing sued on."

And it may also be remarked that the record below (p. 119) showed that Mr. Maltby, principal assistant engineer of the Panama Canal Commission, never saw the contract made by the Government with the appellee, and that Mr. Shonts, chairman of the Isthmian Canal Commission, if he did not know that there was a change in the size and weight of the materials made by the terms of the contract, it was due to his own negligence.

Counsel for appellee believe that the findings of ultimate facts heretofore made by the Court of Claims, as explained and amplified by the opinions filed by the court, show conclusively that if the officers of the Government did not know that there was a reduction in the size and weight of certain

component parts of the dredge, then such ignorance on their part was due to negligence. If this be so, then the question of whether or not the officers of the Isthmian Canal Commission did or did not know is entirely immaterial, and the Court of Claims properly refused to find, under the testimony in the case, that the said officers of the Isthmian Canal Commission did not know of the reduction in size and weight of the component parts of the dredge.

II.

Nothing would be added to the clearness of the facts found by the court below by the additional finding now requested, as the second request in the motion here filed in that behalf. The Court of Claims has found that the dredges proposed by claimants and contracted for by the Government were reduced in both weight and strength from the dredges suggested in the specifications annexed to the printed advertisement calling for proposals for the construction of these dredges. The amount of this reduction in actual figures is immaterial and can have no effect whatever on the legal questions involved in the decision of this case.

Quoting from Judge Atkinson's opinion (R., 27):

> "While it is true, as argued at bar, that there was a material difference between the claimant's first bid for the construction of the six barges for the Isthmian Canal Commission (under the Government's advertising circular, No. 310-C, which specified the size and strength of the barges desired by said commission), yet it was so specifically and clearly stated by the claimant in its second bid for the construction of the desired barges, the strength, weight, and measurement of the same being in detail specifically set forth, all which being agreed upon as shown by the contract, that we cannot see any means of escape for the defendants upon either the law or the facts involved.
>
> "The Government's proposal in its specifications was for the construction of six steel dump barges,

> The bid of the claimant was for six steel dump barges. The specifications suggested that the barges should be of a certain length, beam, and draft. The bid of the claimant proposed to construct barges of the same length, beam, and draft. The specifications called for a certain carrying capacity. The bid covered specifically these requirements. The specifications required the rake, hoppers, with water-tight bulkheads, inclination of hoppers, method of bolting same, etc. The bid proposed the construction of barges meeting all of these requirements. In short, the only difference in the barges which the claimant proposed in its contract to construct under its bid was a difference in weight of framing and plates from those contained in the advertisement of the defendants' circular No. 310-C."

And again (R., 28):

> "Nor do we agree, as contended, that there was a substitution of different strength and material for those provided in the specifications of the defendants as to the manner of constructing the barges. On the contrary, it would be rather a modification thereof. It is admitted that the defendants desired barges of a certain weight and strength, but when it was learned that they could not be manufactured for anything like the price expected by the agents of the defendants the claimant tendered a bid to construct barges of the same dimensions but of less strength and weight, which bid was accepted and a contract was drawn thereunder and was duly signed and executed by the parties thereto."

III.

The same argument would apply to the third request for additional findings of fact. The amount of difference between the component parts of the dredge suggested in the specifications annexed to the advertisement and the dredge which was actually contracted for by the Government, it is submitted, can have no bearing upon the decision of this

court. The Court of Claims refused on three separate occasions to incorporate this difference as an ultimate finding of fact, or in the form of a *statement by counsel* as part of the record. This it did after full opportunity of judging whether or not this difference in detail had any bearing whatever on the case.

The request now made for three additional findings of fact is an attempt to get before this court, not ultimate facts, but evidence tending to establish ultimate facts. The manifest purpose and object of the motion is to get the facts now requested to give color to the pretence of appellant that there was some fraud or misrepresentation on the part of claimants in getting the Government to execute the contract now in suit, whereas the court below expressly negatived the contention (R., 25).

This attempt is clearly shown in the brief filed by appellant in opposition to the motion to dismiss or affirm; the impropriety of any statement or argument based on the assumption that the appellee was guilty of any fraudulent conduct or misrepresentation in connection with this contract will be subsequently pointed out in detail.

It is respectfully submitted that the record in this case gives this court in the fullest way all the material facts which have been proved in this case.

The petition with the annexed exhibits filed is clear and explicit. The findings of fact are full and sufficient, and when this court has before it, in addition, the two full opinions filed by Judge Atkinson, there can be no question that the court is in possession of every fact that is necessary to enable it to arrive at a clear understanding of both the merits of this case and the law.

In this connection, the case of Mahan *vs.* U. S. (14 Wallace, 109) is interesting.

The court (Miller, J.) says:

> "It is not possible to look at the first three rules adopted when the appellate jurisdiction of this court was first exercised, without seeing that the purpose

was to bring nothing here for review but questions of law leaving the Court of Claims to exercise the functions of a jury in finding facts equivalent to a special verdict and with like effect.

"In practice it was found that the Court of Claims did not in many cases, make the necessary finding of facts until after they had rendered their decree and complaints were made here that the findings were often insufficient to present the law points on which parties relied and of which they desired a review in this court.

"To remedy these evils the fourth and fifth rules were adopted at the December Term, 1869.

"The fourth requires the Court of Claims to make and file their finding of facts in all cases where an appeal can be taken, in open court, at or before the time of entering their judgment. The fifth rule enables a party to obtain a finding of that court on any question of fact arising in the case and deemed by him essential to its decision. He has only to file a written request that as to that point the court will make a finding. But it was never supposed that the party would ask or the court must find the fact to be as the party claimed it and if they did not, that he could, for that reason, bring the whole testimony here to show that he was right. To do this would be to render useless all the rules adopted by this court, and to reverse the system on which we have proceeded from the first."

The fifth rule referred to in this decision is substantially like the present fifth rule. Except as subsequently shown, the last part of the rule allowing the record to this court to contain the overruled requests for findings of fact has been omitted. Under the rule as it then existed the court states that the requests for findings of fact and refusal can be made a part of the record and that then this court can determine whether said requests are so material as to require the case to be sent back for the findings requested. Concluding the opinion, the court says:

"In the present case the Court of Claims did make a very explicit finding on the questions of fact pre-

sented by the request of plaintiff, and this is all the rule required, though the finding is contrary to her averment."

Counsel for appellee maintain that the findings heretofore made cover the requests now asked for, and that the appellant is not entitled to demand further findings of fact.

Affidavit of S. S. Ashbaugh.

In that affidavit (of counsel) the affiant undertakes to state *his opinion* of what was proved by the evidence given before the Court of Claims. He further makes the statement that "all of said evidence was undisputed." The affidavit states that neither Mr. Shonts nor Mr. Maltby knew before or at the times of the execution of the contract that the dredge contracted for could not be built according to the modified specifications of the Government without exceeding in weight two hundred and sixty thousand (260,000) pounds. It fails to state why the officers of the Isthmian Canal Commission did not know it. From the evidence and admissions in the case made by Mr. Shonts and Mr. Maltby, it is evident that they should have known this fact and the Court of Claims, in the opinions by Judge Atkinson before referred to, has so decided. The affidavit fails to recite the fact that Mr. Ross, general purchasing agent of the Isthmian Canal Commission, who conducted the negotiations with appellee, was not put upon the stand by the appellant, and that, therefore, it is impossible to know what his knowledge in this respect was.

It cannot be argued that appellee was under any duty to explain to each and every one of the officers of the Isthmian Canal Commission what it proposed to furnish under the contract. If Mr. Ross knew, this was sufficient as far as the Government is concerned. We think the assumption a fair one that as Mr. Ross was not put upon the stand by the Government, and as all the negotiations for the purchase

of these dredges were conducted by him, he knew exactly what the Government expected to get when it entered into the contract of August 17, 1906, with appellee. The record itself shows that Mr. Maltby's attention was directed particularly to the weight of the dredge proposed to be furnished by claimants (R., 12, 13), and this before the contract was entered into. This was done by appellee's letter of July 27, 1906, and was in answer to Mr. Maltby's letter (R., 13) of June 26, 1906, calling Mr. Ross' attention to the fact that the Ellicott Machine Company's drawings did not show any details as required in the specifications. Appellee's letter of July 27, 1906, states as follows (R., 12, 13):

> "We have also inserted on the drawing a schedule of displacement, load and draft showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire. * * *
>
> "We take this opportunity to call your attention to the bid of the next lowest bidder, Winant, of Brooklyn, N. Y.
>
> "A schedule of displacement on this bid will show as follows:
>
> | | |
> |---|---|
> | Displacement of hull as shown on maximum permissible draft line of 8′ 0″—20,263 cu. ft. at 65 lbs.... | 1,317,095 lbs. |
> | Deduct weight of minimum permissible load—350 cu. yds. at 3,240 lbs. | 1,134,000 " |
> | Net weight of barge including equipment ..... | 183,095 lbs. |
>
> "From the above you will note that we are offering about 80,000 pounds more material on each barge than our competitor at about $1,000.00 less per barge."

A dredge being nothing more than a square iron box, the price of the same is based principally on the weight of

material in it. Both from the contractor's and purchaser's standpoint, therefore, the weight of the dredge is the most important feature.

The Court of Claims decided that there was no fraud or misrepresentation on the part of appellee (R., 25), and the necessary assumption from this is that the Government officials must have understood appellee's proposal; and, if they did not, then they were guilty of such gross negligence that they cannot escape on the theory that they did not so understand it. The tabulated statement appearing in Mr. Ashbaugh's affidavit was not produced as testimony in the case in the form given. It is a tabulation made by counsel from testimony given in the case and we do not admit its accuracy. Taking, for example, the last item shown on this tabulation, we find:

"Item.	Government specifications.	Claimant's bid.	Percentage of reduction.
Net weight....	45,000 lbs.	26,000 lbs.	45"

A simple calculation will show that the figure giving the percentage of reduction is not 45 per cent, but 42.23 per cent.

The affidavit and also the brief filed by counsel in this case, while laying great stress on the amount of reduction in weight of the component parts of the dredge, make absolutely no reference to the corresponding *reduction in price* for which appellee offered to build the dredge. As shown by the record (R., 1 and 24), appellee proposed to build a dredge in strict accordance with the Government specifications annexed to the advertisement for $148,000. The dredges of lighter weight were offered to be built at $101,400 (R., 2, 7, 11, etc.). This reduction in weight, therefore, here so ingeniously complained of by appellant, was accompanied by a corresponding reduction in price, and when the Government refused to carry out this contract with appellee the cheapest bid for which it could get the dredges built on the unmodified specifications was on the bid of

$149,000 by the Newport News Shipbuilding Company (R., 24).

The unfairness of the position taken by appellant is shown fully by the testimony before the court below, but enough is in the record in this case to give this court information upon this point.

In the petition filed (R., 5) the following language appeared:

> "And that in answer to this information claimant wrote, under date of September 15, 1906, to said D. W. Ross, stating that it was willing to return to the original specifications as to framing and plates, but if this was insisted upon it would decrease the displacement to some extent, and consequently the carrying capacity of the barges; otherwise the weight of the barges would exceed the total called for in the contract, namely, two hundred and sixty thousand (260,000) pounds.
>
> "Claimant further suggested in this letter that the original specifications as to framing and plates could be carried out and at the same time the same capacity, as shown on drawing No. 2105, maintained if the cost of the additional material was covered by a supplementary contract."

Annexed Overruled Motions.

The motions annexed to the motion for additional findings of fact were properly refused by the Court of Claims, and the action of that court in not allowing them to be incorporated in the record on appeal was, without question, correct. They are simply *ex parte* statements on the part of counsel as to what they think has been proved by the evidence before the Court of Claims. The motions having been fully briefed and argued, and having been refused by the Court of Claims, and, in addition, that court having specifically refused to incorporate them in the record on appeal, the attempt to bring them before this court in the manner now adopted ought not to be countenanced.

Brief in Support of Motion.

The rules of this court contained in the brief filed in support of the motion by the appellant are clear and specific and indicate exactly what should be contained in the record of a case appealed from the Court of Claims. Rule 2 states that the Court of Claims should find the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them.

The requests now made do not constitute ultimate facts, but are merely evidence tending to establish such facts. (See U. P. Ry. Co. *vs.* U. S., 116 U. S., 154.) The additional facts requested are not "vital facts." In the case of U. S. *vs.* Adams (9 Wall., 661), quoted by appellant, the court says:

> "But we cannot give the Court of Claims any directions as to what finding it shall make or how it shall proceed to make up its finding on the points in question. If that court should refuse, with the proper evidence before it, to find the material facts desired by either of the parties, the proper remedy would be to make a request that such finding be made and to except in case of refusal."

The motion for additional findings of fact should not be allowed and the annexed affidavit and motions should not be taken as part of the record.

Appellant in its brief relies for the propriety of the present motion upon the case of U. S. *vs.* Adams, *supra*. It appears from that case that the rules 4 and 5, relating to appeals from the Court of Claims, were not then in force.

In the opinion the court says:

> "Perhaps an additional rule on the subject would make the rights of the parties and the duty of the court less ambiguous than they now are."

That case was decided April 30, 1870, and it is to be observed that this court passed the following rules at the December term, 1869, subsequent to the opinion in said Adams case (see U. S. *vs.* Driscoll, 95 U. S.):

Rule 4:

> "In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case."

Rule 5:

> "In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on appeal, to this court."

These rules were passed for the purpose of giving the party requesting a finding without success an opportunity to present the same in the record on appeal to this court.

The effect of the subsequent passage of these rules is to destroy the applicability of the Adams case (*supra*) to the case at bar.

The rules above set out are specifically referred to in Mahan *vs.* U. S., already referred to in this brief.

Upon further examination it appears that these rules were amended by this court January 29, 1879 (97 U. S.), and rules 4 and 5, relating to appeals from the Court of Claims, now read as follows:

Rule 4:

> "In all cases in which either party is entitled to appeal to the Supreme Court the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open court, before or at the time they enter judgment in the case."

Rule 5:

> "In every such case, each party at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact."

It will be noticed that that part of rule 5 requiring the incorporation in the record of this court of the requests for findings of fact and refusal thereof has been omitted from the present rule. This must have been done intentionally. When we consider this fact in connection with rules 1 and 2 of the Court of Claims (set out in paragraph 1 of appellant's brief in support of motion for additional findings of fact), relating to what matters should be incorporated in the record on appeal to this court, it is apparent that appellant is not entitled to have in this record the requests made for findings of fact which were refused by the Court of Claims.

Especially is this true when we consider that the facts now requested are substantially the same as previously requested by the appellant and refused by the Court of Claims.

The omission from the present rule of the latter part of said former rule 5, passed in the December term, 1869, indicates a desire on the part of this court not to go into the question of the action of the Court of Claims in respect of *overruled* requests or motions for findings of fact.

This is further emphasized by referring to rule 6, paragraph 1, of this court.

That rule is as follows:

> "All motions to the court shall be reduced to writing and shall contain a brief statement of the facts and objects of the motion."

We do not think that it was intended by the language of this rule that the moving party should supplement his motion by *ex parte* affidavits and other writings not in the record of the case.

In U. S. *vs.* Griffith (141 U. S., 212) this court showed conclusively its attitude in this respect.

The opinion (Mr. Chief Justice Fuller) is as follows:

> "The motion by appellant for leave to dismiss its appeal in this cause is accompanied by certain correspondence which is referred to as stating the grounds on which the motion is made. We cannot be called upon to examine into these papers for the purpose of arriving at a conclusion as to whether the dismissal is justifiable or not, and must decline to permit them to be filed and to thereby leave it to be inferred hereafter that we may have acted upon them."

In the case of Hudgins *vs.* Kemp (18 How., 530), which is similar to this case in that appellant here uses the affidavit and other matters outside of the record to support his defense to appellee's motion to dismiss or affirm, the court (Chief Justice Taney) states as follows:

> "This case has been brought up to this court by appeal from the decree of the Circuit Court of the United States from the District of Virginia, and a motion is made on behalf of the appellee to dismiss it, upon the ground that it had not been removed in the manner the law requires, and that, therefore we have no jurisdiction over it. And certificates and statements of the clerk, outside of the record, and given since it was certified and transmitted to this court, have been filed as evidence of the irregularity of the removal.
>
> "This evidence is not admissible upon the present motion. The record transmitted to this court, certified by the clerk of the Circuit Court, states that the appeal was taken in open court. This is sufficient evidence of that fact. And upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record, as certified and returned by the clerk of the Circuit Court, can be received here to impeach its verity, or to show that the certificate ought not to have been given. The case, as therein set forth, is the case before this court."

Appellant's Brief in Opposition to Motion to Dismiss or Affirm.

Before concluding the argument on this branch of the case, counsel for appellee wish to call the court's attention to certain statements contained and conclusions reached in the brief filed by appellant in opposition to the motion to dismiss or affirm. These statements which we object to are of three kinds: *First*, statements entirely outside of the record before this court and, we believe, contrary to the facts as stated in the findings of the Court of Claims and in the opinions of said court given by Justice Atkinson—these statements directly impugn the actions and motives of the appellee in making the contract in suit; *second*, statement of matters entirely unsupported by the record concerning other matters bearing more or less directly on the case; and, *third*, statements based on the matters set out in the affidavit of Mr. Ashbaugh and in the annexed copies of motions and brief, which statements counsel for appellant assume to have been proved as facts, to be undisputed, and found in the record.

We have already drawn attention to the fact that the Court of Claims, whose opinion on this question must be final, has decided that there was *not any evidence of misrepresentation, concealment, deception or fraud* on the part of the appellee (R., 25, 28). The Court of Claims came to this decision deliberately and after fraud, misrepresentation, etc., had been charged to appellee by counsel for the Government repeatedly and in most positive language, although not the slightest justification therefor is found in the testimony or record below.

The evidence presented in the case was full and complete on this point, and the position of appellee as being entirely innocent of any fraud, misrepresentation or disingenuous conduct was definitely proved by this evidence and found by the Court of Claims (R., 25, 28). Although this is a fact

and so shown by the record, we find in the brief filed by appellant in opposition to the motion to dismiss or affirm the following language (Brief, 6 and 7):

> "Especially in view of the disingenuousness of appellee's conduct in deliberately misleading the agents of the commission by means of language which seemingly amounted to an assurance that the specifications as to weight and size of materials would be complied with," etc.

(Brief, 20:)

> "* * * because the conduct of appellee shows conclusively that it deliberately led the officers of the canal commission to believe that its proposal was to construct barges in accordance with the specifications as to weight and size of materials. There can be no doubt about this. * * * Instead, appellee purposely used language which seemed to convey an assurance that the specifications would be complied with, and by that language secured the execution of the writing now before the court."

(Brief, 21:)

> "The Court of Claims entirely misconceived the real issue in the case. It proceeded upon the assumption that the language of the writing executed by the parties was clear and unambiguous, although it explicitly held that the explanation of it in appellee's letter of July 27 *was only sufficient to put the canal officers 'on inquiry.'*"

Returning to the record, we find as a basis for this statement the following language (R., 24):

> "The very fact of this great difference in the amounts of the bids, taken in connection with claimants' former bid of $148,400, it seems to us, was sufficient in itself to have put the defendants on inquiry. Attention was called to this fact by claimants in their letter of July 27, 1906 (Finding IV), to the defendants' division engineer, wherein attention was called to the weight of the barges proposed by the bid of a

> Brooklyn, N. Y., firm for $111,000, as compared with the weight of the barges which claimants proposed to build, which letter of claimants revealed the fact that the two firms were evidently bidding on a different character of barges. The attention of defendants was further called to this same fact by a conspicuous note on a large blue print prepared by claimants, which is attached to and is made a part of the contract, which note gives the net weight of the barges, and this weight was to be distributed in such manner as the defendants might direct."

It is unnecessary to point out that the language used in the appellant's brief is not supported by the record.

(Brief, 23:)

> "The conduct of one of the parties (meaning appellee) has been disingenuous and misleading, if not actually fraudulent."

(Brief, 37:)

> "Although the Court of Claims was of the opinion (as a matter of law—not as a matter of fact) that the facts in this case did not show fraud on the part of appellee, and although there is perhaps lacking such actual misrepresentation as would amount in law to fraud, still the record in this case does disclose a degree of disingenuousness on appellee's part which barely stops short of fraudulent misrepresentation, by means of which the canal commission was induced to execute the writing in question in the mistaken belief," etc.

(Brief, 38:)

> "Appellee deliberately refrained from making a frank reply to Maltby's letter and purposely suggested phraseology for the proposed agreement which was calculated to and did mislead the canal officers. That it pursued this course in the hope and expectation that its real purpose would remain undiscovered until the writing had been signed is too clear

> for argument, etc. A contract obtained by such means is clearly unconscionable."

(Brief, 39:)

> "* * * while here it is due to the disingenuousness of appellee's conduct inducing the canal officers to execute an instrument which, if construed as appellee construes it, is entirely different from the one which was intended by them."

Counsel for appellee contend that all the language quoted from appellant's brief is absolutely unsupported by the testimony in the case; that there is not in this case the slightest evidence whatever of any fraud, misrepresentation, or disingenuousness or misleading conduct on the part of appellee, and that the Court of Claims, with the testimony before it, has so found. The language in appellant's brief above referred to is, therefore, we think, entirely improper, and finds no warrant or justification.

The brief filed by appellant also states that "the Court of Claims refused to consider extrinsic evidence showing that the canal commission was in fact misled by the conduct of appellee," etc. (Brief, 7).

(Brief, 24:)

> "It further decided as a matter of law that extrinsic evidence offered for the purpose of showing that the officers of the canal commission did not so understand the arrangement was not open to consideration."

As a matter of fact the Court of Claims did not refuse to consider any evidence adduced at the trial; but, after consideration of all the evidence, the court refused to find facts which it did not deem to have been proved.

There are other statements of a similar character in the brief to which it seems unnecessary to call this court's attention.

The brief further assumes, as proved and as part of the record, matters and facts stated in the *ex parte* affidavit filed by S. S. Ashbaugh.

(Brief, 26:)

> "* * * and the fact is, as disclosed by the affidavit in support of the motion submitted with this brief, that said materials proposed to be used were of only about half the strength and weight of those required by the specifications."

It is respectfully suggested that this affidavit and the facts contained in it are not properly before this court, as part of the record, for the purpose of making deductions in appellant's brief to support its conclusions of law.

On page 38 of the brief the following language occurs:

> "* * * and shown on the record in the Court of Claims by the positive and uncontradicted testimony of the officers of the canal commission to which attention is called in affidavit in support of the Government's motion for additional findings of fact, submitted herewith," etc.

The fact claimed to be shown is not shown in the record, and appellant in its brief has attempted to tell this court what is shown by the testimony given by the officers of the canal commission appearing only in the record of the Court of Claims, and attempts to support the statement by reference to an *ex parte* affidavit which calls attention to the alleged fact. The language is clearly improper and should not be given a controlling effect by this court.

Reply Brief to Appellant's Brief in Opposition to Motion to Dismiss or Affirm.

The brief and accompanying motion of appellant so tends to cloud and confuse the simple issues of this case that it may not be improper to invite the attention of the court to matters actually in the record and which are open for consideration by this court.

In addition to the matters already referred to generally, there are parts of appellant's brief that are not properly open for consideration by this court.

Those parts are as follows:

(1) *Page 17, Brief, Division III.*

The point here made is a question of fact and not one of law. The Court of Claims decided that the contract in question was a legal and binding contract; that the language used in article 1 thereof, construed in connection with the letters and blue prints annexed to and made part of said contract, modified the specifications for said dredges contained in said contract, and that the manner in which appellees desired to perform said contract was in accordance with the terms thereof. This decision was rendered only after a careful investigation of all the facts surrounding the making of this contract and the evidence, written and parole, which the court had before it. There was, in the opinion of the Court of Claims, no ambiguity or indefiniteness about the contract and no mutual misunderstanding in reference thereto. It was and is perfectly plain that the modifications made by the bid and contract to the original specifications, annexed to the public advertisement, were clear and were understood by appellee and should have been understood by the officers of the Government. The question of what effect (other than that found by the Court of Claims) this modification had on the original specifica-

tions is, therefore, not open to consideration by this court. The Court of claims has decided that the contract is a valid and binding one, and that under this contract appellee had to build lighter barges in order to comply with the terms thereof, and this court cannot depart from this conclusion.

To illustrate that the point here propounded is a matter of fact and not of law.

Appellant undertakes to say why the Maltby letter of January 26, 1906, was annexed to the contract, and further states that the language of the contract was adopted with full knowledge on appellee's part that the Commission expected and would insist upon compliance with the requirements as to weight and size of materials. Counsel for appellee think the evidence in the case proves the exact contrary. The record is silent on this point.

Appellant says that nothing would have been easier than to suggest phraseology which would clearly show that the specifications were to be abrogated, and says it failed to do this. The testimony, however, shows that appellee made every attempt to explain to the Government what it intended to furnish, and both the appellee and the experts who testified said that they showed the Government clearly what was proposed to be furnished.

To meet the facts stated as facts in the brief filed by appellant it is apparent that we have to go entirely outside of the record before this court, and yet, if we do not deny the matters stated by counsel for appellant, it might be assumed that we admitted them. Without particularizing further, it is expressly controverted that the record in this court or the record in the Court of Claims support the facts stated in Division III of appellant's brief.

Referring to Division IV of the Brief.

It is also insisted that there is no evidence in the record, either here or in the Court of Claims, showing any ambiguity in the contract in suit; and it is submitted, as matter

of law, that a mistake in the subject-matter of a contract must be mutual in order to relieve the mistaken party from the consequences of his solemn and deliberate act in entering into a contract. It is further submitted that the Court of Claims did not hold, as matter of law, that it was immaterial that the minds of the parties never met; and, in conclusion, it is further controverted that the minds of the parties never met on this contract or that there is anything in this record to show that condition of fact.

We respectfully suggest that the whole Division IV of the appellant's brief is improper and brings up for discussion before this court matters not disclosed by the record.

Division VI of Appellant's Brief.

We suggest that the argument contained in this entire division is improper, as there is not one word in the record which permits the conclusion that the "contract was unconscionable."

This leaves of the appellant's brief for consideration by this court—

(1) The statement.

(2) Division I (being the argument on motion to dismiss).

(3) Division II (being the argument on motion to dismiss).

(4) Division V (relating to commission's authority to contract for a lighter barge than advertised).

These four divisions are, we think, the only questions disclosed by appellant's brief which are open for review by this court, and we will proceed to discuss them in the order given.

(1) *Statement.*

Appellant complains at the outset that the statement of the case contained in appellant's brief is insufficient. Counsel for appellee now make the same complaint against the

statement made by appellant. Instead of attempting to amplify the statement contained in our former brief, or to add to or correct the statement made by appellant, we respectfully suggest that the petition, findings of fact, and the two opinions of Justice Atkinson will give a clear and correct statement of the actual facts and proper deductions to be made therefrom.

(2) *Division 1, Appellant's Brief.*

It should be noted that in Brockett's case (2 How., 238), relied on in appellant's brief, the appeal was taken from a chancery court, and the rules of practice relating to the taking of appeals and the filing of petitions is different from the practice in the Court of Claims. In this case appellant had lost its right to appeal before it filed its petition, sixteen days having passed. The fact that the court opened up the case by considering the petition and subsequently reaffirming the decree necessarily would have the effect of dating the final decree June 9. Counsel for appellant will certainly not argue that in the Court of Claims the defeated litigant could allow a period of more than ninety days to elapse and then, by filing a motion for a *new trial* within the judgment term, revive *de novo* the period of ninety days if the motion for a new trial was subsequently overruled and the final decree was not renewed or re-entered, but allowed to stand as and when rendered as the final judgment of the court.

In the next case quoted in appellant's brief, Memphis *vs.* Brown (94 U. S., 715), the court decided that the form of the entry was equivalent to setting aside the judgment and entering it anew. Continuing the quotation commenced by the appellants, the court says:

> "As the writ was issued on the day of the order and its allowance embraced the entry recording the order itself, there cannot be any doubt of the intention of the court to give the judgment at that time such an effect."

We are prepared to admit that if the Court of Claims in overruling a motion for a new trial had explicitly at that time renewed or re-entered the judgment of May 18, that then the appeal would have been in time; but this was not done nor did the order of the Court of Claims have this effect. The case of Memphis *vs.* Brown, therefore, cannot have any bearing upon the present case.

In the next case, Aspen Mining and Smelting Company *vs.* Billings (150 U. S., 31), the decree was rendered October 20, 1890, and the motion for a rehearing was filed October 25, 1890. This motion was decided May 5, 1891, and *immediately* thereafter the appeal was prayed.

That case does not govern, because it is a proceeding in an equity court on a petition for a rehearing which the court entertained, and it is not comparable to a motion for a new trial before the Court of Claims, where the judgment itself is not affected by filing the motion unless the new trial is granted, and does not require to be renewed or re-entered when the motion is overruled. Not only this, but in the case under consideration the petition for a rehearing was filed five days after the decree and the appeal was filed immediately when the petition was overruled. The point now in question was not under discussion and was not decided by the court. This case is entirely consistent with the point now made, namely, that where the time limited for appeal, exclusive of the time during which the motion for a new trial is pending, has expired, then, unless the judgment is renewed or re-entered, the right of appeal is lost.

The same may be said of the next case quoted in Vorhees *vs.* Noye Manufacturing Company (151 U. S., 135).

There the motion for a rehearing was filed *immediately* after the decree. *At the same time* the defendant prayed for an appeal, which was allowed. The court denied the motion for a new trial, holding that "it is now too late to sustain said motion or interfere with the decree." There was no question in that case of any delay on the part of defendant in

praying for an appeal, as the appeal was prayed for *at the time* the motion for a rehearing was made. When the appeal was ready to be prosecuted the Supreme Court ceased to have jurisdiction and it was necessary to appeal to the Circuit Court of Appeals.

While the case of Kingman *vs.* Western Manufacturing Company (170 U. S., 675), next discussed in appellant's brief might upon first consideration be taken as opposed to appellee's contention, it is easily distinguishable therefrom. The court in that case says distinctly that the question before it is merely whether the judgment is final so that the jurisdiction of the appellate court may be invoked while the case is still under the control of the trial court, through the pendency of a motion for a new trial, and it only decides, so far as this case is concerned, that such appellate jurisdiction cannot be so invoked while a motion for a new trial is pending.

To illustrate the difference in practice between the Court of Claims and other courts we cite the case of U. S. *vs.* Young (94 U. S., 258).

In that case it was held that the Court of Claims, after an appeal had been prayed and allowed, and during the pendency in this court of such appeal, had the right to grant a motion for a new trial and this would have the effect of requiring the dismissal of the appeal in the Supreme Court.

> "The Court of Claims, by granting a new trial, has resumed control of the cause and the parties. This it had the right to do. Such a power may be somewhat analogous but it is expressly given," etc.

See also U. S. *vs.* Crusell (12 Wall., 175).

In order to save its right of appeal from a judgment of the Court of Claims it is only necessary to pray for the allowance of appeal within the ninety days. This has been repeatedly decided. See Latham *vs.* U. S. (9 Wall., 145).

Attention is also called to the fact that appellants have failed to meet the point raised by appellees that the appeal

in this case has not been taken from the final judgment, but from the order refusing to grant a new trial.

The case of Texas Railway Company *vs.* Murphy (111 U. S., 488), quoted in appellant's brief, does not meet the case. In this case "the writ of error as issued is *on its face* for the review of the final judgment," etc.

In the case before this court the appeal prayed *on its face* is from the order of January 4 overruling the motion for a new trial, and not an appeal from the final judgment of the Court of Claims, rendered May 18, 1908.

Appellant's Brief, Division II.

Here the appellant cites the case of Whitney *vs.* Cook (99 U. S., 607). This case has no application on the point discussed, for it came up on *a motion to affirm only*, and was not coupled with a motion to dismiss.

Appellant's Brief, Division V.

It is manifest that the law recited in appellant's brief and governing the awarding of contracts by the Isthmian Canal Commission and the necessity of advertising therefor (except in cases of emergency) is most general and broad in its terms. All that is required is "due public advertisement in newspapers of general circulation." The form of the advertisement is not specified, nor what it shall contain, nor the number of times it must appear, etc., etc. The result is that the officers of the Isthmian Canal Commission must of necessity have a great deal of latitude in this respect. All the cases cited by appellant on this point relate to radical departures from the advertisements on the part of municipal contractors in their bids. The powers of municipal officers are usually clearly defined and very limited in respect to awarding contracts for city work. The cases cited are predicated on facts very different from those controlling in the present case, where the Isthmian Canal

Commission has very broad and general powers. Under the law as stated practically everything is left to the discretion of the officers of the Isthmian Canal Commission.

Not only this, but the Court of Claims (R., 28) has held that the dredges in question were advertised for in such a way and for such length of time to give ample opportunity for competitive bidding.

The Court of Claims has held also that the change made by the proposal from the specifications, by which a dredge was agreed to be furnished lighter than the one suggested in the specifications annexed to the advertisement, was a *modification* of the specifications entirely within the power of the officers of the Isthmian Canal Commission to make. It must be borne in mind that the advertisement proper was one thing and the specifications annexed thereto, which were general in form, quite another.

It seems unnecessary to take up in detail the cases cited in paragraph V of appellant's opposition brief. It will be apparent upon reviewing them that they have no bearing on the case here presented.

In conclusion, it is submitted that the grounds for the motion to dismiss are ample and sufficient; that if the court does not so decide, then, under the numerous decisions of this court, there can be no question that there is sufficient color for the motion to dismiss to justify this court in considering the motion to affirm the judgment of the Court of Claims on the merits; that upon such consideration this court will find that the judgment of the court below was proper and i naccordance with the facts found; that there is nothing left for review by this court, and that there is no need for oral argument, which would subject the appellee to further delay. The record speaks for itself and the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

FRANCIS K. CAREY,
JAMES PIPER,
A. A. HOEHLING, JR.,
Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, Appellant,
v.
CHARLES E. ELLICOTT AND JOHN B. NORRIS, Copartners, trading as Ellicott Machine Company, Appellee. } No. 521.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATEMENT.

Nothing need be added to the statement of facts upon which the motion to dismiss is based. They are undisputed, and bring the case within the principle which has been established by repeated decisions of this court, namely, that when a motion for a new trial is made and entertained at the judgment term, and before the time for appeal has run, the judgment is thereby suspended and does not become final for purposes of appeal until the motion has been overruled, with the result that the time for praying an appeal begins to run only at the time of the overruling of such motion.

29468—10——1

Appellee's statement concerning the merits, however, is utterly insufficient, so that a full review of the facts is necessary here.

In the latter part of May or the early part of June, 1906, the Isthmian Canal Commission advertised for bids for the construction of six steel dump barges (Division IV of petition, Rec., 2). This advertisement is known in the record as "Circular 310–C," and included specifications for the barges (Rec., 15–18). These specifications described in a general way the type of barges required, viz, barges with a capacity of not less than 350 nor more than 400 cubic yards each, "of heavy construction for rough service," not less than 25 feet nor more than 32 feet in breadth, and of sufficient length to carry a full load of sand on a draft of not more than 8 feet, with hoppers of prescribed character; and then, under the heading of "Framing," prescribed, in detail, the weight and dimensions of the structural materials.

In reply to this advertisement, appellee submitted a proposal to construct the desired barges, "subject to specifications of Circular 310–C with such modifications as are shown on drawing No. 2105, dated June 7, submitted herewith" (Finding IV, Rec., 20). The plan referred to (Rec., 19), as so submitted, showed the outline of a barge 101 feet 4 inches long, 30 feet wide, and 10 feet 6 inches in height, and a note on it read as follows:

> Capacity of Bins—350 Cu. Yards. Maximum Loaded Draft When Carrying 350 Cu. Yds. Of Material Weighing 3240 Lbs. Per Cu. Yard, Not To Exceed 8′–0″,

thus fixing by this plan, within the limits allowed by the specifications, the length, width, draft, and capacity of the barge, which details, as we have already seen, were left to the discretion of each bidder, within such limits.

The bids were evidently referred by the Commission to their Engineer Maltby for examination, and on June 26, 1906, he addressed a letter to the purchasing agent of the Commission, with which he inclosed "a small sketch showing the desired arrangement of the hinges on the hopper doors, and the method of securing timber lining to hoppers," which he submitted for the purpose of reaching an accurate understanding, before the contract was let, concerning these details. In the letter he also stated:

> It is noted that the drawing submitted by the Ellicott Machine Works does not show any details as required by the specifications. *It is presumed, however (and we should insist on it), that the framing will be in strict accordance with our specifications.* (Rec., 13.)

Thereupon said purchasing agent, Ross, prepared and transmitted to appellee a draft of contract for the erection and delivery of the barges, but appellee returned said draft, suggesting that Article I thereof be rewritten, so as to provide for the construction of—

> six steel dump barges in accordance with specifications contained in Circular No. 310–C of the Isthmian Canal Commission, dated May 29, 1906; with such modifications as are shown on drawing No. 2105, dated June 7, 1906, and

> subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract. (Rec., 3.)

In the letter returning said draft of contract, appellee also stated that—

> our drawing No. 2105 was not intended to show working details, *but solely to limit the conditions of displacements, load, and draft.* As long as these are maintained we shall be pleased to follow *such reasonable design of working details in arrangement and distribution of material* as Mr. Maltby or his inspector may require. (Division VI of petition, Rec., 2, 3.)

Appellee also, at the request of said Ross, addressed a letter, dated July 27, 1906, to Maltby, in which it submitted—

> print No. 2105 revised July 27, specifying details as called for in your letter of June 26, 1906, of hinges, hoisting gear, and method of securing timber lining to hoppers.

In said letter, too, this statement was made:

> We have also inserted on the drawing a schedule of displacement, load and draft, showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, *and this weight may be distributed in any way your representative may desire.* (Rec., 12.)

This statement was, of course, made in reply to Mr. Maltby's objection that the plan submitted did not show any details and his statement that the specifications as to framing would be insisted on; and both it and the letter to Ross, stating that the plan was not intended to show working details and that appellee would be pleased to follow such reasonable design of working details in the arrangement and distribution of materials as Mr. Maltby might require, seemed to be assurances that the materials to be used in the framing would accord with the specifications.

Thereupon an instrument was executed by the parties, providing that appellee would construct—

> six (6) steel dump barges, in accordance with specifications contained in Circular 310–C of the Isthmian Canal Commission, dated May 29, 1906, with such modifications as are shown on drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, outlined in letter of Ellicott Machine Company dated July 27, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch are attached hereto and form a part of this contract. (Rec., 8.)

It will be observed, therefore, that Maltby's letter stating that the specifications as to framing would have to be strictly complied with and appellee's seemingly acquiescent reply thereto were both attached to and made parts of the instrument.

Thereafter, and before beginning work upon the barges, appellee presented to the government inspector of barges, under whose supervision the barges would have been built, a list showing in detail the materials proposed to be used in constructing the barges. The materials shown on such list were "reduced in weight, size, and power of resistance" as compared with the materials specified in Circular 310–C aforesaid. (Finding VII, Rec. 22.) And upon the Government's insisting that the materials used should be in accordance with the specifications, appellee pointed out, *for the first time*, that the use of the specified materials would result in barges weighing more than 260,000 pounds, and refused to use such materials unless "the cost of the additional material was covered by a supplementary contract" (Div. XIII of petition, Rec. 5); whereupon the Commission refused to approve the submitted list of materials, and awarded the contract for the construction of the barges to another firm. This suit is brought to recover the profits lost through the Commission's alleged breach of contract, the contention of appellee being that the mere statement noted on the plan and in said letter of July 27, that the net weight of the barge would be 260,000 pounds, constituted a complete abrogation of all specifications concerning weight and size of materials and permitted construction of barges of the stated weight without any regard whatever to such specifications as to materials. The contention of the Government, on the other hand, was, and is, that the mere

notation of the net weight of the barge on the plan, especially in view of the disingenuousness of appellee's conduct in deliberately misleading the agents of the Commission by means of language which seemingly amounted to an assurance that the specifications as to weight and size of materials would be complied with, was not sufficient to show a "modification" of the specifications in respect to the weight and size of materials within the meaning of the phrase requiring the barges to be constructed in accordance with the specifications with only such modifications as were shown (which means distinctly and clearly shown) on the plan, and outlined (which means distinctly and clearly outlined) in the letter of July 27 aforesaid. Beyond that, however, the Government contends that the Court of Claims erred *as a matter of law* in refusing to consider extrinsic evidence showing that the Canal Commission was in fact misled by the conduct of appellee above referred to, at least for the purpose of determining the true construction of the instrument; *also that if the construction put upon the writing by appellee and the Court of Claims be correct, then the attempted contract is an absolute nullity because it provides for radically different barges from those for which proposals were invited and consequently was not made after competitive bidding as required by law;* and finally that, in any event, appellee is not entitled to more than nominal damages.

ARGUMENT.

I.

This appeal was prayed in apt time.

In this respect appellee's contention (brief, p. 6) is:

> That when defendant filed a motion for a new trial on the eighty-fourth day after the rendition and entry of judgment, it had the effect to *suspend* merely (and not to revive *de novo*) the further running of said jurisdictional period of ninety days; and that when said motion was overruled the United States had remaining six days within which to apply for the allowance of an appeal, and that having failed so to do within said period of six days its right to the appeal was lost.

The error of this view is that it overlooks the fact that the entry and entertainment of the motion for a new trial suspended the judgment itself, and not merely the running of the limitation as to appeals. The effect of the motion was to make the judgment a mere order *nisi*, not only from the time the motion was entered *but from the date of the judgment itself*. The entertainment of such a motion *relates back to the date of the rendition of the judgment* quite as effectually as though the court had entered an explicit order amending the judgment by making it conditional upon the disposition of a motion for a new trial, or had entered an order setting aside the judgment unless cause to the contrary should be shown. And as a result, so far as the running of the time for

appeal is concerned, the case is as though no judgment had ever been entered at all. The authorities make this entirely clear.

In *Brockett* v. *Brockett* (2 How., 238) it appeared that a final decree was entered on the 10th of May, 1843; that during the same term and on the 26th day of the same month defendant filed a petition to open the decree for certain purposes; that the court *took cognizance of the petition*, but on the 9th of June following *refused to open the decree;* whereupon, on the 15th day of June, more than a month after the entry of the original decree, an appeal was prayed. The court, speaking through Mr. Justice Story, said:

> Now, the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a *supersedeas*, or to stay execution on the decree; because to have such an effect the appeal should be made and the bond should be given within *ten days* after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the court, and it did not take effect until the 9th of June, and that the appeal was duly taken and the appeal bond given within ten days from this last period (p. 241).

This same contention, viz, that a writ of error was not obtained within ten days after the entry of final judgment, so as to entitle the plaintiff in error to a *supersedeas*, was again raised in *Memphis* v. *Brown*

(94 U. S., 715), in which case it appeared that the judgment was entered on March 2, 1876, and that at the same term and on May 20, 1876, the court *entertained*, but overruled, a motion to set aside the judgment. The court said:

> Under the ruling in *Brockett* v. *Brockett*, 2 How. 241, the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2 and entering it anew as of that date. This the court had the right to do during the term and for the very purpose of giving it effect for a *supersedeas* (pp. 717, 718).

In *Aspen Mining & Smelting Co.* v. *Billings* (150 U. S., 31) it was contended that an appeal taken to the Circuit Court of Appeals was unauthorized and void—

> because the original final decree was entered October 20, 1890, one of the days of the May term, 1890, of the Circuit Court, while the appeal to the Circuit Court of Appeals was prayed, allowed, and perfected on July 2, 1891, and at the May term, 1891, of the Circuit Court, contrary, as insisted, to the rules and the statute (pp. 34, 35).

The court, speaking through Mr. Chief Justice Fuller, held that the entertainment of the motion for rehearing deprived the original decree of its final

character, so that the statutory period of six months within which the appeal had to be taken, under section 11 of the act of 1891, did not commence to run until said motion for a new trial was disposed of. The Chief Justice said:

> The decree dismissing complainants' bill was entered on October 20, 1890, but an application for a rehearing was made shortly thereafter and during the same term, but not disposed of until May 5, 1891.
>
> The rule is that if a motion or a petition for rehearing is made or presented in season and *entertained by the court*, the time limited for a writ of error or appeal *does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal* (p. 36).

In *Voorhees* v. *Noye Manufacturing Co.* (151 U. S., 135) it appeared that a final decree was entered on January 7, 1891, by the Circuit Court for the District of Nebraska. A motion for rehearing was made within the term, which was overruled on February 17, 1892. Between the stated dates the act of 1891, creating the Circuit Court of Appeals, was passed. It was held that, as the case was of a sort appealable only to the Circuit Court of Appeals after July 1, 1891, the appeal to this court would not lie, though the judgment was originally entered prior to July 1, 1891, because the entertainment of the motion for rehearing destroyed the final character of the decree

and prevented it from becoming final for purposes of appeal until the motion was overruled in 1892.

Finally, in the case of *Kingman* v. *Western Manufacturing Co.* (170 U.S., 675), which was a common-law action, governed as to procedure, however, by the statutes of Nebraska, which required judgment to be rendered at once upon return of the verdict, but permitted a motion for a new trial to be made within three days after the judgment and during the same term, it appeared that the judgment was entered on June 4, 1895, a motion for a new trial made on June 6, 1895, and overruled on December 11, 1895, more than six months after the date of the original entry of the judgment. A writ of error was thereupon allowed, and it was contended in this court that it was not taken within six months after the entry of final judgment, and should therefore be dismissed; but this court, after reviewing many authorities, reiterated the rule announced in the cases already cited and, in conclusion, said:

> The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for a new trial. We do not think it is, *and are of opinion that the limitation did not commence to run in this case until the motion for new trial was overruled* (pp. 680, 681).

It will be observed that in each of the foregoing cases a final judgment or decree and not merely a verdict had been rendered, so that the suggestion in

appellee's brief (p. 7) that a peculiar and special rule should apply in the case of appeals from judgments of the Court of Claims, because the motion for a new trial is not made in such court until after final judgment, is wholly without merit.

As to the suggestion (pp. 11 and 12 of the brief) that the defeated party might, by making repeated motions for a new trial, prolong indefinitely the period for taking an appeal, it is sufficient to say that, as the cited cases show, it is an unquestioned qualification of the rule stated in those cases that the motion for a new trial or rehearing or to vacate the judgment does not affect its finality unless the motion is actually *entertained by the court*, and that therefore the court may always, by refusing to entertain the motion at all, prevent any such consequence as that deplored by appellee.

At page 8 of the brief it is said that the Government could have filed its application for an allowance of an appeal before or with its motion for a new trial, and so have saved its right to appeal, no matter how long it might have taken ultimately to dispose of the motion; and the cases of *United States* v. *Ayres* (9 Wall., 608) and *Ex parte Roberts* (15 Wall., 384) are cited as sustaining the propriety of this practice. It is admitted, however (p. 9), that in such a case it would be *improper* to *allow* the appeal *until the motion for a new trial was disposed of*. This admission (which is, of course, unavoidable) disposes of the contention (if that be appellee's contention, which is not entirely clear) that the application for appeal *should*

be made at least cotemporaneously with a motion for a new trial; for it would be absurd to *require*, under penalty of loss of the right of appeal, that the application for it be made at a time *when its allowance would be improper*. The cited cases, however, do not even sustain the propriety of the practice. In the *Ayres* case it was held that a motion for a new trial made after the appeal had been allowed under the special provision of the statute permitting such motion (in certain specified instances), *notwithstanding the pendency of the appeal*, did not constitute ground for dismissing the appeal, but that the appeal could *not* be maintained *after the motion for a new trial had been granted*. The decision therefore only amounts to this: That, because of the stated statute, the Court of Claims does not lose jurisdiction to entertain and, if it sees fit, to grant a motion for a new trial, notwithstanding the pendency of an appeal "upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States." It does not deal with the matter of *application for appeal* at all. In the *Roberts* case, although it appeared that an application for the allowance of an appeal was made during the pendency of a motion for a new trial, the *propriety of the application at that time was not considered*, but the decision was merely that, in view of the express stipulation of the parties that the appeal should not be allowed until the motion for a new trial was

disposed of, an order inadvertently entered allowing the appeal did not deprive the Court of Claims of jurisdiction of the case, but that the court could rescind such order and act upon the motion for a new trial.

There is also in the brief a suggestion that this appeal is not prayed from the final judgment, but is only prayed from the order overruling the motion for a new trial, because the prayer for appeal describes the judgment as "the judgment rendered in the above-entitled cause on the 4th day of January, 1909." This suggestion is answered by the case of *T. & P. Railway Co.* v. *Murphy* (111 U. S., 488). In that case the Supreme Court of the State of Texas entered its final judgment on *May 29*, 1883. Thereafter, it entertained a motion for a rehearing, which was denied on *December 21*, 1883. Whereupon a writ of error was sued out for review of the case in this court, describing the judgment as "rendered against the Texas & Pacific Railway Company on the *21st of December, A. D. 1883*," and the contention was "that as the judgment entered on the 21st of December was only an order overruling a motion for a rehearing," the writ of error did not bring to this court for review the final judgment of the court below. The court, after showing by the authority of *Brockett* v. *Brockett, supra*, that the entertainment of the motion for rehearing suspended the final judgment, said:

> The writ of error as issued is on its face for the review of the final judgment, not of the

> order refusing a rehearing. The judgment is sufficiently described for the purposes of identification. We are of opinion therefore that the judgment as entered on the 29th of May is properly before us for consideration. The motion to dismiss is overruled (p. 489).

Finally, it is contended (though the pertinency of such contention on the present motion is not perceived) that the Court of Claims had no power to entertain the motion to amend the findings made January 17, 1909. This contention overlooks the fact that the judgment did not become a finality *until January 4, 1909*, one of the days of the December term, 1908, and that the motion to amend the findings, entered a few days later and within that same term, was therefore made before the judgment had passed out of the control of the court.

II.

The question sought to be raised by the motion to dismiss has been so frequently considered and so decisively settled by this court in the cases cited under the foregoing point that there is not even color of right to a dismissal, and the motion to affirm should therefore not be considered.

The rule in this respect was announced in *Whitney* v. *Cook* (99 U. S., 607), cited in appellee's brief, page 13, as follows:

> Our amended Rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are therefore compelled to deny the motion.

It has been uniformly adhered to ever since, as is shown by the other cases cited in appellee's brief. It is submitted that, in view of the clear and repeated decisions of this court already cited, the motion to dismiss is without even color of right, and is made solely in an effort to obtain a decision in this case on its merits out of its regular order and without that full argument, printed and oral, to which the court is entitled in the consideration of the questions here presented, one of which at least is of large general importance, quite aside from its bearing upon the present case. The motion to affirm should, therefore, not be entertained; but if it should be entertained, then it should be denied, because—

III.

The writing executed by the parties expresses with seeming clearness an agreement for the construction of barges of the dimensions shown on the plan, but of materials of the size, weight, and character prescribed by the specifications; and the fact that such construction would require barges of greater weight than was noted on the plan should not be permitted to alter the plain meaning of the language used.

It will be noted that Article I of the instrument executed by the parties explicitly stated that the barges were to be constructed in accordance with the specifications, except in so far as modifications of those specifications were shown on the plan and outlined in the letter of July 27, 1906. The only modifications shown on such plan or outlined in

such letter related to purely architectural features, viz, the length, width, height, draft, and capacity of the barge, and the details respecting hinges, hoisting gear, and method of securing timber lining to hoppers, unless it can be said that the statement concerning the weight of the barge constituted a "modification" of the specifications in that it abrogated entirely all provisions respecting weight and size of structural materials; for it can not be contended that the statement of the net weight of the barge made any *specific* changes in the requirements as to the character of the materials; and therefore such statement could not show or outline any mere "modification" of the specifications *regarding materials*, but could, at best, only show a purpose to entirely disregard them. But such a purpose is utterly inconsistent with the explicit reference to the specifications, because there could be no possible object in referring to the specifications at all if their provisions concerning size and weight were to be wholly disregarded, for all the architectural features of the barges were fixed by the plan, and properly so, since the specifications were not intended to be, and were not in fact, definite as to them. If, therefore, the reference to the weight of the barge could be regarded as sufficient to abrogate the specifications with reference to the weight and size of materials, then the reference to the specifications would become pure surplusage. A construction which would bring about such a result is precluded by several considerations.

(1) Maltby's letter of June 26, 1906, *which was attached to and made a part of the writing*, explicitly stating that the specifications as to framing, i. e., weight and size of materials, would be insisted on, can not be ignored; and it is utterly inconsistent with the idea that the specifications were attached to the writing without purpose.

(2) The language, "in accordance with specifications * * * with such modifications as are shown on drawing No. 2105," was adopted at the request of appellee, made with full knowledge on its part that the Commission expected and would insist upon compliance with the requirements as to weight and size of materials; and, of course, with full knowledge, too, of exactly the sort of barge which it (*appellee*) had in mind. Nothing could have been easier than to suggest phraseology which would clearly show that the specifications as to framing were to be abrogated, if appellee had desired to make its purpose apparent. Its failure to do so calls into operation, to its fullest extent, the rule that language is to be construed most strongly against the party using it, and requires, therefore, that the ambiguity arising from the fact that the barges could not be constructed of the required materials without exceeding the noted weight be resolved unfavorably to appellee. (*Garrison* v. *United States*, 7 Wall., 688.)

(3) "The rule in ethics is, that 'when the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the prom-

isee received it,' and this is the established rule at law, as well as in morals. In the language of the books, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee." (*White* v. *Hoyt*, 73 N. Y., 505, 511.)

The foregoing language was used in a case involving the construction of a contract made by correspondence, and it has peculiar force in this case, because the conduct of appellee shows conclusively that it deliberately led the officers of the Canal Commission to believe that its proposal was to construct barges in accordance with the specifications as to weight and size of materials. There can be no doubt about this. Appellee knew when it suggested the change in the phraseology of Article I, and particularly when its letter of July 27 was written, that the officers of the Canal Commission deemed strict compliance with the specifications to be vital. Its purpose to depart from those specifications could have been made entirely clear by a frank statement that if the weight of the proposed barge would be compared with the weight of a barge constructed in accordance with the specifications, it would be seen that it was not proposed to follow those specifications. Instead, appellee purposely used language which seemed to convey an assurance that the specifications would be complied with, and by that language secured the execution of the writing now before the court. All intendments should, therefore, be against it in the construction of the instrument.

(4) Finally, the construction here urged is necessary to sustain the validity of the instrument, for either that construction or the one urged by appellee must be adopted if the instrument is to be given any meaning at all; and if the *latter* construction (that is, the one urged by appellee) should be adopted, *the instrument would be void for the reason pointed out in Division V, infra.*

IV.

At most the impossibility of constructing a barge of the proposed dimensions and specified materials without exceeding the weight noted on the plan only renders the meaning of the writing ambiguous and imposes on the court the duty to ascertain by extrinsic evidence the true intent of the parties. Accordingly, the Court of Claims erred in holding as a matter of law that it was immaterial in this case whether or not the evidence showed that the minds of the parties never met.

The Court of Claims entirely misconceived the real issue in the case. It proceeded upon the assumption that the language of the writing executed by the parties was clear and unambiguous, although it explicitly held that the explanation of it in appellee's letter of July 27 *was only sufficient to put the canal officers "on inquiry"* (Rec., 24), and that the Government was seeking to contradict a plainly expressed agreement by showing that it was executed under a misapprehension of fact on the part of the Canal Commission. If such had been the case the decision of the Court of Claims would doubtless have been correct, but in truth, as has been shown in the preceding point, there is an irreconcilable repugnancy

between the language of Article I and the statement on the plan that the barges would weigh only 260,000 pounds each; and unless, for the reasons already given, the doubts are to be resolved against appellee, there is a hopeless ambiguity. In such a case the court not only may, but must resort to extrinsic evidence for the purpose of determining the true intention of the parties. The general rule on this subject was well stated in *Walker* v. *Tucker* (70 Ill., 527, 532), as follows:

> In the construction of a contract, where the language is ambiguous, courts uniformly endeavor to ascertain the intention of the parties and to give effect to that intention; but where the language is unambiguous, although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced.

Instances of the application of the rule in this court will be found in *C. & O. Canal Company* v. *Hill* (15 Wall., 94); *Moran* v. *Prather* (90 U. S., 492); *Reed* v. *Insurance Company* (95 U. S., 23).

And since the extrinsic evidence is looked to only because without it the meaning of the parties can not be determined, it must be that when such extrinsic evidence shows indisputably that the minds of the parties were never in accord, the court can not avoid holding the attempted contract a mere nullity even though reduced to writing. In other words, although it is true that ordinarily only oral contracts are subject to attack on the ground that the minds of the

parties did not meet, nevertheless when a written instrument is so ambiguous that the court can not determine its meaning with certainty without the aid of extrinsic evidence, the case is then practically identical with the case of an oral contract. There is no rule which requires that every writing shall be given some effect. The most solemn of all writings, viz, deeds of land and wills, are frequently held void for uncertainty, and attempted contracts are constantly voided on the ground of repugnancy. In every such case the court looks to extrinsic evidence before arriving at any conclusion, but when it finds no aid in such evidence it is obliged to hold the instrument invalid. *A fortiori* is this necessary when the extrinsic evidence not only fails to clear up the ambiguity, but affirmatively shows that the minds of the parties never met.

But even if the writing could not be held void merely because the extrinsic evidence affirmatively showed that the minds of the parties did not meet, yet that fact would have an important bearing upon the construction of the instrument, especially when, as in this case, the conduct of one of the parties has been disingenuous and misleading, if not actually fraudulent. The Court of Claims therefore should have considered and found all the facts surrounding the execution of the instrument in order that it might be construed in the light of those facts. This it did not do. It even made no finding as a fact with regard to the meaning of the writing. It found only that the parties executed the instrument de-

scribed in and made part of the petition (Finding VI, Rec., 21, 22), and (in its opinion) as a *matter of law* construed this writing to permit construction of the barges without regard to the specifications as to weight and size of materials. It further decided as a matter of law that extrinsic evidence offered for the purpose of showing that the officers of the Canal Commission did not so understand the arrangement was not open to consideration.

In view of the ambiguity already pointed out, this decision was clearly erroneous.

V.

If the instrument must be construed as evidencing an agreement to construct the barges of lighter and smaller materials than those specified, it is absolutely void, because the Canal Commissioners had no authority to make a contract for the construction of a barge which did not conform at least substantially with the specifications as to the weight and size of materials.

Section 3709 of the Revised Statutes (p. 733) provides:

> All purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles or performance of the service.

The act creating the Isthmian Canal Commission (32 Stat., 481) by its seventh section provided that

"Said commission shall in all matters be subject to the direction and control of the President."

Pursuant to the authority so vested in him the President on April 1, 1905, issued an executive order for the government of the Canal Commission which, among other things, required that:

> Contracts for the purchase of supplies or for construction involving an estimated expenditure exceeding $10,000 shall only be made after due public advertisement in newspapers of general circulation, and shall be awarded to the lowest responsible bidder, except in case of emergency, when, with the approval of the Secretary of War, advertising may be dispensed with.

Finally by a joint resolution approved June 25, 1906 (a month before the execution of the instrument here in question), Congress explicitly declared:

> That purchases of material and equipment for use in the construction of the Panama Canal shall be restricted to articles of domestic production and manufacture, from the lowest responsible bidder, unless the President shall, in any case, deem the bids or tenders therefor to be extortionate or unreasonable. (34 Stat., 835.)

It is not pretended, nor can it be claimed, that this case falls within the exceptions to any of the foregoing declarations of the rule requiring the letting of contracts of the present sort only after competitive bidding.

The Court of Claims found:

> That the barges which the claimants proposed to construct were different from those described in circular letter and specifications 310–C, set forth in the petition, the principal component parts or members being reduced in weight, size, and power of resistance, and thereupon the same was disapproved by the officers of the Government. The list of materials so submitted for the approval of the inspector of the Government was in conformity with said specification 310–C, as modified by the parties as set forth in article 1 of said contract. *That is to say,* the materials so submitted in conformity with said specifications *were subsequently reduced in both weight and strength to conform to the barges proposed to be constructed by claimants.*

The word "subsequently" in the last sentence of the foregoing quotation is doubtless a typographical error. The word intended must have been "substantially," for the word "subsequently" in the connection in which it appears is without meaning, and the fact is, as disclosed by the affidavit in support of the motion submitted with this brief, that said materials proposed to be used were of only about half the strength and weight of those required by the specifications. This being true, it results that the barges which appellee proposed to construct are radically different from those specified, and consequently the case is as though no advertisement at all had been made; for *the sole purpose of requiring advertisements for proposals is to obtain for the Government the benefit*

of competitive bidding, and where the different bids relate to radically different types of barges, it can not be said that the bids were competitive. Not only so, but it is practically impossible to determine which bid is the lowest, because there is no basis of comparison.

Beyond that, if after advertising for a specified thing the Canal Commission or any other department of the Government can accept a bid for a radically different thing, the door will be opened to favoritism and fraud. This case furnishes a good illustration. Suppose the Canal Commission had desired to favor appellee and had suggested to it that it would accept a barge constructed of such light materials that it would weigh only 260,000 pounds, while its specifications required and consequently all other bids contemplated the construction of a barge of such heavy materials that it would weigh 450,000 pounds. Could an easier way to evade the requirement of competitive bidding and accomplish favoritism be imagined? Would anyone claim that in the case supposed a valid contract to accept the lighter barge could be executed?

It is true the Court of Claims thought, *although the reduction in weight and size of materials was so radical that it reduced the total weight of the barge nearly one-half*, that this reduction was a mere "modification" of the specifications as to weight and size of materials (opinion overruling motion for new trial, Rec., 28), and that it was unreasonable to insist that such a mere modification could not be made. There might be force in this suggestion if the "modification" were

in fact unimportant, so that notwithstanding it the proposal was for substantially the same thing described in the specifications; but an attempt to substitute for a barge "of heavy construction for rough service" (the sort specified) a barge of light construction for easy service, can not be considered such an immaterial modification as may be permitted without violating the rule requiring competitive bidding. A brief review of the authorities showing the zealous care with which this and other courts have guarded the public interests in respect of public contracts is conclusive on this question.

In *District of Columbia* v. *Bailey* (171 U. S., 161) there was an attempt to make an agreement for the submission of a controversy between the District and Bailey to arbitration by an order entered on the minutes of the Commissioners, but not signed by any of them. A statute required that all contracts involving the expenditure of more than $100 should be reduced to writing, recorded in a book kept for that purpose, and signed by all of the Commissioners. The court said (p. 178):

> By the express terms of the statute the Commissioners are forbidden to enter into any contract binding the District for the payment of any sum of money in excess of $100 unless the same is reduced to writing and is recorded in a book to be kept for that purpose, and signed by all the Commissioners, the statute declaring, in express terms, that no contract shall be valid unless recorded as aforesaid. This mandatory provision of the

statute clearly makes the form in which a contract is embodied of the essence of the contract. In other words, by virtue of the restrictions and inhibitions of the statute a contract calling for an expenditure in excess of $100 can not take effect unless made in the form stated. The form, therefore, becomes a matter of fundamental right, and illustrates the application of the maxim *forma dat esse rei*. That the mere statement of the appointment of a referee on the minutes, without the signature of any of the Commissioners, did not comply with the requirements referred to, is too clear for discussion. The attempt to give effect to such entry as a contract, without regard to the requirements of the law, illustrates the wisdom of the statute and the evil of disregarding it; for on the trial two of the three commissioners testified, one on behalf of the plaintiff and the other on behalf of the defendant, and swore to directly opposite views as to whether or not there had been a common-law submission by the Commissioners.

In *McMullen* v. *Hoffman* (174 U. S., 639) two bidders for a contract for constructing a sewer for the city of Portland, Ore., submitted separate bids but agreed between themselves that if either secured the work it should be done by both and the profit or loss shared equally. One of such bidders did secure the contract and did the work, but refused to permit the other to participate in it or in the profits. Thereupon the latter brought suit under the contract. This court regarded the question of such general importance as to warrant the issuance

of a writ of certiorari, and when the record came before the court it was held that the supposed contract was void. The court, among other things, said (p. 651):

> Upon general principles it must be apparent that biddings for contracts for public works can not be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals, but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies, such as municipal and other corporations, at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible, and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination and from fictitious bids.

In *Whitney* v. *Village of Hudson* (69 Mich., 189) it was held that the common council of a village which was required by law to let contracts for public improvements to the lowest bidder had no authority to

let a contract to "Hubbard Smith" upon a bid made by "Hubbard Smith & Son."

In *Nash* v. *City of St. Paul* (11 Minn., 174) it appeared that the city authorities advertised for bids for the paving of a specified street under two separate contracts, covering different sections of the street to be paved. Nash made one bid for the entire work, and a single contract covering all of it was executed. Afterwards the city refused to permit the contract to be carried out, and the suit was brought. The court held that the contract was void because it was not "the same that was advertised."

In *Overshiner* v. *Jones* (66 Ind., 452) the suit was brought to recover the amount of a special assessment for street improvement. A statute authorized municipal authorities to cause street improvements "to be done according to the specifications by them to be adopted by contracts given to the best bidder, after advertising to receive proposals therefor." The proposal in question did not state that the work was to be done according to specifications, and it was therefore held that an alleged contract between the municipality and the bidder based upon the acceptance of the bid was void.

Wickwire v. *City of Elkhart* (144 Ind., 305) was a suit to enjoin the city from improving a certain street under a contract awarded by the common council to one Nims. One of the requirements of the advertisement for bids was that—

> All bids shall be made per square yard, setting out in full kinds of brick and other ma-

> terials to be used, also the price per running foot of curbing; and no bid shall be entertained *having within it any provisions whatsoever*. But the price per square yard shall include all the necessary work and materials in making the pavement complete. *All work specified to be completed by August 1, 1893* (p. 306).

The attempted contract entered into between Nims and the city varied from this advertisement in that it provided (1) for an extra allowance for hauling surplus dirt excavated in preparing the street for the pavement if such dirt should be hauled more than one-half mile; (2) that the work should be completed on or about *December 1, 1893*, and allowed further time in case of delay through strikes, and (3) that it provided for partial payments every thirty days to the extent of 90 per cent of the estimated value of the work done during the preceding thirty days. The court held that this alleged contract was void. The court said:

> That the common council had power to improve the street in question and to assess the cost of the improvement against the property is clearly given by the express provisions of the statute cited. It no less clearly appears from the language, and the necessary implication from these provisions, that the council, in the exercise of this power, should award contracts for the work upon and as the result of fair competitive bidding. No one could say, with the support of reason, that such a contract, awarded without receiving a bid,

would be valid. Such a contract would not be awarded pursuant to the mode pointed out by the statute. The purpose and object of the statute is manifest. It was designed to protect the interests of the property owner in securing the best results for the least expenditure and to spare municipal officers the embarrassment, if not the opportunity for corrupt action, of denying contracts to personal and political friends whose proposals are not so favorable to the property owner as that of another. It is as clearly implied from the language and purpose of the statute as if distinctly written in words that the contract must be the result of the competition. In *Platter* v. *Board, etc.* (103 Ind., 360), it was said: "The provisions of a statute intended to prevent favoritism and insure fair competition upon equal terms to all who choose to compete in bidding, are enforced with a firm hand." Was the contract in question the legitimate result of the competition offered by the council? If the council could strike from the bid the objectionable features therein, a proposition we do not consider, it is difficult to see how the contract could be made upon a basis entirely different from that contemplated by the specifications and the form of bid supplied. It is, it seems to us, perfectly clear that all competitors were entitled to place their bids upon the basis upon which the contract was to be awarded and that to require bids upon one basis and award the contract upon another was, in practical effect, but to abandon all bids (pp. 308–310).

In *People* v. *Board of Improvement* (43 N. Y., 227) it appeared that the statute authorizing the proposed improvement required the contract to be let after public advertisements for bids in accordance with the plans and specifications of the Board of Improvement. The board adopted a plan to improve the street with Belgian paving, but prepared no specifications. The engineer of the board prepared specifications for Nicolson paving, but the board never adopted them. Thereupon bids were invited for paving with Belgian, improved Belgian, Nicolson, and other improved pavements, according to plans and specifications which might be seen at the office of the engineer. It was held that under these conditions there could be no truly competitive bidding, and the court refused a mandamus to compel the execution of a contract for the work with one who claimed to be the lowest bidder. After setting out the facts showing the uncertainty of the advertisement as to the character of paving required, the court said:

> What followed might reasonably have been expected, and perhaps was what was intended by the board. Ten propositions were received, no two of which were for the same kind of pavement. It was impossible for the board upon a canvass of these offers to determine therefrom which was the lowest. This could only be determined by considering which kind of pavement proposed for was the most desirable and durable and advantageous for use and to what extent superior to the others, and then comparing these with the

like qualities of the other kinds, in connection with the cost of each, and from this determining what offer was really most advantageous as a whole for the public. The act contemplated the performance of no such duty by the board. It designed to open no such way for the exercise of favoritism. It designed that the work should be competed for as to price by contractors, and that this should be done in such a way that the lowest bidder could be determined by calculation without any exercise of judgment as to the relative advantages of different kinds of pavement. It is said by the counsel for the relator that there was a patent upon the kind of pavement it proposed for, owned by it, and that some other kinds are also patented, and that the kinds patented can compete in no other way than in the mode attempted in the present case. This may be true, but it by no means follows that this mode is permitted by the act in question. That clearly does not permit it. The board clearly had no power to award any contract upon offers received under such a notice as was published in the present case (pp. 230–231).

In *People* v. *Van Nort* (65 Barb., 331) there was an attempt by mandamus to compel Van Nort, as commissioner of public works, to execute a contract for paving certain streets. The common council of the city of New York had directed the paving of certain streets, and in pursuance to this direction proposals for the work were invited. Afterwards another resolution was adopted altering the limits

of the improvement and excepting within its limits portions of the streets which were already paved between railroad tracks, but no new advertisement was made for this work, and the right to the contract was claimed under a bid made pursuant to the first advertisement. The court said (pp. 332, 333):

> There can be no doubt as to the effect of the change of the resolution by the common council. The original proposal was from the Bowery to Mangin street. Whether there was any difference in the character of the work by limiting the distance to Lewis street does not appear; but it is evident from the second resolution that the work to be done was changed by excepting portions of the street which had been paved and by excepting the pavement between the tracks of the railway. It was irregular in the Croton board, under the circumstances, to award a contract which had been made upon proposals to do the work in a different way from that which was contemplated when the notice was published for receiving such proposals. They had no right to make such award, and if it had been done, no assessment made under it would have been valid.

The case of *Garfielde* v. *United States* (93 U. S., 242), cited on this point in appellee's brief (p. 16) is not at all pertinent. In that case proposals were invited for carrying mail (1) "between Portland, Oregon, by Port Townsend (W. T.) and San Juan, to Sitka, Alaska," and also (2) "to begin at Port Townsend (W. T.) five hundred miles less," and the only

question considered by the court was whether or not the description of this alternative route was sufficiently definite to show that the Government desired a proposal for carrying the mails from Port Townsend to Sitka. The bid submitted was for carrying from Port Townsend to Sitka, and there was therefore no variance whatever between the advertisement and the bid, because, as the court held, the language used sufficiently showed that the alternative route was between Port Townsend and Sitka.

VI.

Even if the writing in question constituted a valid contract to construct the barges of lighter and smaller materials than those specified, yet under all the facts and circumstances of the case such contract was unconscionable. In no event, therefore, was appellee entitled to more than nominal damages.

1. Although the Court of Claims was of opinion (as a matter of law—not as a matter of fact) that the facts in this case did not show fraud on the part of appellee, and although there is perhaps lacking such actual misrepresentation as would amount in law to fraud, still the record in this case does disclose a degree of disingenuousness on appellee's part which barely stops short of fraudulent misrepresentation, by means of which the Canal Commission was induced to execute the writing in question in the mistaken belief (shown on the record now before the court by the letter of June 26, 1906, from Maltby and the rejection of the bill of materials submitted by appel-

lee; and shown on the record in the Court of Claims by the positive and uncontradicted testimony of the officers of the Canal Commission to which attention is called in the affidavit in support of the Government's motion for additional findings of fact, submitted herewith) that appellee proposed to follow the specifications as to weight and size of materials. Appellee deliberately refrained from making a frank reply to Maltby's letter and purposely suggested phraseology for the proposed agreement which was calculated to and did mislead the canal officers. That it pursued this course in the hope and expectation that its real purpose would remain undiscovered until the writing had been signed is too clear for argument. Otherwise it would have called attention to the fact, *which it knew from Maltby's letter was not then known to the canal officers*, that the specifications as to weight and size of materials could not be complied with if the barges were to weigh only 260,000 pounds each. A contract obtained by such means is clearly unconscionable.

2. And the rule is:

> Where parties intend to contract by parol, and there is a misunderstanding as to the terms, neither is bound, because their minds have not met. Where there is a written contract and a like misunderstanding is developed, a court of equity will refuse to execute it. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter,

but only such as he is equitably entitled to. *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164; *Baxter* v. *Wales*, 12 Mass., 365. (*Hume* v. *United States*, 132 U. S., 406, 412.)

In that case there was an indisputable contract to furnish the Government (among a great many other things) shucks at 60 cents per pound, but the court found that the Government made the contract in the obvious supposition that the price was 60 cents *per hundredweight*, and, notwithstanding Hume's claim that his bid was intended to be at 60 cents per pound and that he largely relied on that one item for the profit of his contract, the court held that the contract to furnish shucks at such an utterly unreasonable price was unconscionable; and accordingly a judgment of the Court of Claims awarding to claimant only the fair value of the shucks furnished was sustained in pursuance of the rule above quoted. That case differed from this one only in this: That there the unconscionableness of the agreement was due to the unreasonableness of the price, while here it is due to the disingenuousness of appellee's conduct inducing the canal officers to execute an instrument which, if construed as appellee construes it, is entirely different from the one which was intended by them.

3. Appellee sues altogether for loss of profits. There is no claim that it made any expenditures for materials or incurred any liability of any sort by reason of the transaction in question. It is as well off to-day as it was on the day the writing was

signed. It suffered no loss through the Government's refusal to permit it to construct the barges other than the loss of anticipated profits. Under such circumstances, in view of its conduct, it was not in equity and good conscience entitled to any substantial damages. In any event, therefore, the Court of Claims should not have awarded more than nominal damages.

LLOYD W. BOWERS,
Solicitor-General.
BARTON CORNEAU,
Special Assistant to the Attorney-General.

O

if the specifications are not binding on the Government, the contractor has no basis for recovery, and if they are binding the contract varies from the one advertised for and has no validity; and so held as to a bid for barges for the Panama Canal Commission.
44 Ct. Cl. 127, and 45 Ct. Cl. 469, reversed.

THE facts, which involve the construction of a contract for dredges for the Panama Canal and the liability of the United States for damages for abrogation of the same, are stated in the opinion.

The Solicitor General, with whom *Mr. Barton Corneau* was on the brief, for the United States:

This appeal was prayed in apt time.

The entry and entertainment of the motion for a new trial suspended the judgment itself, and not merely the running of the limitation as to appeals. The effect of the motion was to make the judgment a mere order *nisi*, not only from the time the motion was entered, but from the date of the judgment itself. The entertainment of such a motion relates back to the date of the rendition of the judgment.

In *Brockett* v. *Brockett*, 2 How. 238; *Memphis* v. *Brown*, 94 U. S. 715; *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31; *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135; *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675, 680, 681, a final judgment, and not merely a verdict, had been rendered, so that the appellee's suggestion that a special rule applies in the case of appeals from judgments of the Court of Claims, because the motion for a new trial is not made in such court until after final judgment, is without merit.

The writing executed by the parties expresses with seeming clearness an agreement for the construction of barges of the dimensions shown on the plan, but of materials of the size, weight, and character prescribed by the specifications; and the fact that such construction

would require barges of greater weight than was noted on the plan should not be permitted to alter the plain meaning of the language used. *Garrison* v. *United States*, 7 Wall. 688.

When the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received: such is the established rule at law, as well as in morals. *White* v. *Hoyt*, 73 N. Y. 505, 511.

The construction here urged is necessary to sustain the validity of the instrument, for either that construction or the one urged by appellee must be adopted if the instrument is to be given any meaning at all; and if the latter construction (that is, the one urged by appellee) should be adopted, the instrument would be void because the Commission would have had no power to make such a contract.

At most the impossibility of constructing a barge of the proposed dimensions and specified materials without exceeding the weight noted on the plan only renders the meaning of the writing ambiguous and imposes on the court the duty to ascertain by extrinsic evidence the true intent of the parties. Accordingly, the Court of Claims erred in holding as a matter of law that it was immaterial in this case whether or not the evidence showed that the minds of the parties never met. *Walker* v. *Tucker*, 70 Illinois, 527, 532; *C. & O. Canal Co.* v. *Hill*, 15 Wall. 94; *Moran* v. *Prather*, 23 Wall. 492; *Reed* v. *Insurance Co.*, 95 U. S. 23.

If the instrument must be construed as evidencing an agreement to construct the barges of lighter and smaller materials than those specified, it is absolutely void, because the Canal Commissioners had no authority to make a contract for the construction of a barge which did not conform, at least substantially, with the specifications as to the weight and size of materials. See § 3709, Rev. Stat.;

Act creating the Isthmian Canal Commission, § 7, 32 Stat. 481; Joint resolution approved June 25, 1906.

This case does not fall within the exceptions to any of the foregoing declarations of the rule requiring the letting of contracts of the present sort only after competitive bidding. *Dist. of Col.* v. *Bailey*, 171 U. S. 161; *McMullen* v. *Hoffman*, 174 U. S. 639; *Whitney* v. *Hudson*, 69 Michigan, 189; *Nash* v. *St. Paul*, 11 Minnesota, 174; *Overshiner* v. *Jones*, 66 Indiana, 452; *Wickwire* v. *Elkhart*, 144 Indiana, 305; *People* v. *Board of Improvement*, 43 N. Y. 227; *People* v. *Van Nort*, 65 Barb. 331.

Garfield v. *United States*, 93 U. S. 242, is not pertinent.

The Commission had no authority, without readvertising, to enter into a contract for barges of a radically different type from those originally specified. *Fones Hardware Co.* v. *Erb*, 54 Arkansas, 645; *Mazet* v. *Pittsburgh*, 137 Pa. St. 548; *Chippewa Bridge Co.* v. *Durand*, 122 Wisconsin, 85; *Packard* v. *Hayes*, 94 Maryland, 233; *Detroit Free Press Co.* v. *Auditors*, 47 Michigan, 135; *Littler* v. *Jayne*, 124 Illinois, 123.

Even if the writing in question constituted a valid contract to construct the barges of lighter and smaller material than those specified, yet under all the facts and circumstances of the case such contract was unconscionable. In no event, therefore, was appellee entitled to more than nominal damages. *Hume* v. *United States*, 132 U. S. 406, 412, citing *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164; *Baxter* v. *Wales*, 12 Massachusetts, 365.

Mr. James Piper, with whom *Mr. Francis K. Carey* and *Mr. A. A. Hoehling, Jr.*, were on the brief, for appellees:

An appeal in this case was not applied for by defendant within ninety days after the date of the judgment; and the appeal prayed for and allowed was not from the judg-

ment that was entered in the case, but was merely from the order overruling the motion for a new trial.

The only judgment from which appellant could properly appeal is the final judgment of the Court of Claims, and no appeal will lie to this court from a mere order of the Court of Claims overruling the motion for a new trial. *Kellogg* v. *United States*, 19 Ct. Cl. 73; Court of Claims, Rule 107.

Appellant could have filed at any time within ninety days thereafter an application for the allowance of an appeal, and such application would have temporarily suspended the further running of the time incident to the filing, consideration and disposition of a motion for a new trial. *United States* v. *Ayres*, 9 Wall. 609; *Roberts* v. *United States*, 15 Wall. 384; Rules relating to appeals from the Court of Claims.

To require an appellant to prosecute its rights within the statutory period would impose no hardship upon the losing party; whereas, to support the contention that, at its own pleasure, the defendant party may absolutely revive the entire statutory period of ninety days by the filing of successive motions, is contrary to the language of the statute and would impose a great wrong and an unnecessary hardship upon the rights of appellee, as so adjudicated by the court.

The judgment should be affirmed.

The Court of Claims found there was a valid contract that the United States breached, whereby appellee was entitled to recover damages; these findings of fact are conclusive, and the only question proper for review by this court is whether or not the conclusion of law thereon and the entry of judgment by the court in accordance therewith, is supported and justified by the facts as so found.

The record discloses that there were successive advertisements made by defendant for procuring these barges

because of the fact that the bids were in greater amount than defendant desired to pay therefor. The present contract, under a bid which was satisfactory in price to defendant, was entered into, but, while not in any way departing from or changing the subject-matter of the advertisement or specifications, did provide for a barge lighter in framing and plates.

The advertisement simply called for proposals for furnishing and delivering six steel dump barges; hence no contention can be made by defendant that there was any departure in the contract from the subject-matter of the advertisement.

So long as the subject-matter of the advertisement and specifications be not departed from, there can be modifications or changes in respect of mere detailed matters incident to such subject-matter. *International Co.* v. *United States*, 13 Ct. Cl. 209; *McKee* v. *United States*, 12 Ct. Cl. 504.

The Isthmian Canal Commission has authority in law to make a valid contract the terms of which modify the exact terms or specifications accompanying an advertised circular asking for proposals for work and materials.

As for the reasons for public advertisement and awarding the contract to the lowest bidder, see Dillon, Municipal Corp., 5th Ed., 1911, §§ 802, 809.

There was no statute requiring the Isthmian Canal Commission to advertise for bids and to award contracts to lowest responsible bidder. The requirement rests on a communication addressed to the Commission by the President on April 1, 1905, p. 483 Proceedings of the Isthmian Canal Commission, in response to which the Commission adopted a set of resolutions, p. 492 Proceedings, which embodied the same language in regard to letting contracts as contained in the President's communication.

Resolutions passed by the Commission could be altered

by the Commission. They have not the binding effect of a statute.

Granting that the appellees were charged with notice of the resolution, it is general in its terms. No time for advertising is mentioned nor what the advertisement should contain, which certainly indicates that the Commission did not intend to restrict itself. Section 3709, Rev. Stat., does not impose the limitations on the Commission required to support the Government's contention.

The members of the Isthmian Canal Commission are not "ministerial agents," comparable to agents acting for a city or State in carrying out a defined piece of work in a limited and defined manner.

There was a sufficient advertisement to promote economy and there was no fraud or collusion.

The modification was not so material that the barges contracted for were not advertised.

These questions are not now open for review.

Convenience requires that the government officials should be allowed some latitude to modify specifications annexed to advertisements when the contract is made and also to modify a contract after it is made.

The Government is contending for a decision which will make it impracticable to carry on its business. Modifications are the rule. The Government is pleading a technical disability contrary to what might be called the good business faith of the situation, and, like all pleas of this character, it is necessary that the disability complained of should be clearly established.

In *Harvey* v. *United States*, a case which was heard four times in the Court of Claims and twice in this court, 8 Ct. Cl. 501; 12 Ct. Cl. 141; 13 Ct. Cl. 322; 105 U. S. 671; 18 Ct. Cl. 470; 113 U. S. 243; under similar conditions to this the Supreme Court apparently adopted the lower court's theory that the contract was not invalid on account of a departure from bid and specifications, but held

on equitable grounds that it should be reformed on account of having been entered into by mutual mistake.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Whether or not the United States is responsible in damages because of a refusal to permit the carrying out of an alleged contract made with a co-partnership, the Ellicott Machine Company, who are appellees, for the construction for the Isthmian Canal Company of six steel dump barges is the issue here required to be decided. From a judgment for ten thousand dollars entered in the Court of Claims, in favor of the Ellicott Machine Company, because of the refusal referred to, the United States took this appeal.

It will conduce to a clear understanding of the controversy to fully summarize the facts found below, and we proceed to do so.

After two unsuccessful attempts to procure satisfactory proposals for the construction and delivery of the six steel dump barges, the Isthmian Canal Commission, by advertisement and specifications, dated May 29, 1906, invited the proposals which culminated in the making of the alleged contract. One of the clauses of the advertisement reads as follows:

"Preliminary inspection will be made at the point of manufacture or purchase to determine whether the material meets the requirements set forth in the specifications and final inspection will be made at the point of delivery as above."

* * * * * * * *

In the specifications, among other things, it was recited as follows:

"The following specifications and requirements are general only as indicating the class of construction desired.

UNITED STATES *v.* ELLICOTT.

APPEAL FROM THE COURT OF CLAIMS.

No. 85. Argued December 7, 8, 1911.—Decided February 26, 1912.

The general rule governing appeals is applicable to appeals from the Court of Claims.

A judgment is not generally treated as final until a motion for new trial or rehearing, which has been entertained by the court, has been disposed of; in such a case the time for appeal runs from the date of such disposition. *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675.

When there is an irreconcilable conflict between essential provisions of a contract for building and the specifications, and the latter cannot be ignored, the contract is void for uncertainty and unenforceable.

Where a bid has been accepted for government work after the advertisement necessary to give it validity, and the final contract contains specifications materially lessening the work and at variance with the terms of the contract as advertised, the contractor cannot recover damages because the Government abrogates the contract;

"Barges of heavy construction for rough service, built in accordance with best modern marine practice, are desired.

"Bidders will be required to submit with their proposals plans in sufficient detail to show the proposed size of members and details of construction."

* * * * * * * *

"The breadth of the barges should not be less than 25 feet nor more than 32 feet. They should have sufficient depth and length to carry a full load of sand on a draft of not more than 8 feet, and with not less than 30″ freeboard when loaded. They will be rectangular in plan, with rake at each end about 11″ long. . . ."

As shown by an excerpt in the margin,[1] the weight and

---

[1] FRAMING.

Floor beams forward and aft of the hoppers and in the rake should not be less than 10″ deep and extend in one piece to the turn of the bilges. They will be spaced 24″ center to center. Frames to be not less than 3 1/2″ x 5 3/8″ angles overlapping the floors not less than 18″ and connected with them and to floor beams with proper gusset plates. Bilges to be of as short radius as it is practicable to bend the angles and plates.

In addition to the transverse bulkheads mentioned above there will be a watertight bulkhead at each end of each rake.

Transverse water-tight bulkheads will be made of 10.2 pound plate with double-riveted lap joints, stiffened with vertical angle bars 3″ x 3″ x 5 1/6″ spaced 2″ apart, except that the plates forming the ends of the hoppers will be of 21-pound plate, stiffened with 4″ x 4″ x 3/8″ angle bars spaced 2′ apart.

In the space forward and aft of the hoppers there should be a central longitudinal bulkhead of 10.2-pound plate, fastened at the top of the floor beams and deck beams by 4″ x 4″ x 3/8″ angle; it will be stiffened by vertical 3″ x 3″ x 5/16″ angles, spaced 2′ apart. This bulkhead should extend from the hoppers to each end of the barges.

In addition to this bulkhead there will be 2 longitudinal lattice trusses, one on each side midway from the center bulkhead to the side of the hull. They will have top and bottom cords of 3″ x 3″ x 5/16″ angles riveted to each floor and deck beam, lattice bars to be 3″ x 3″ x 5/16″ angles made in double panels and joined top and bottom with

dimensions of the structural materials were prescribed with much detail under the head of "Framing." In reply to this advertisement appellee submitted a proposal to construct the desired barges, "subject to specifications of Circular 310–C, with such modifications as are here shown on drawing No. 2105, dated June 7, submitted herewith." The plan referred to, as so submitted, showed the outline of a barge 101 feet 4 inches long, 30 feet wide, and 10 feet 6 inches in height, and a note on it read as follows:

"Capacity of Bins—350 Cu. Yards. Maximum Loaded Draft When Carrying 350 Cu. Yds. Of Material Weighing 3240 Lbs. Per Cu. Yard, Not to Exceed 8′—0″."

After examination of the bids by F. B. Maltby, Division Engineer on the Canal Zone, that official returned the bids to the general purchasing officer of the Commis-

---

proper gusset plates with not less than 3 rivets in each landing. These trusses will extend from the hoppers to the rake.

In the rake there should be a 3″ x 3″ x 3/8″ angle stanchion secured to each deck beam and floor timber on line with the said trusses.

Deck beams to be of 5″ x 3/8″ Z bars spaced one to each frame, each beam to be attached to its frame by 5/16″ gusset.

Gunwales to be not less than 4 1/2″ x 4 1/2″ x 7/16″ angle running inside the side plating and below the deck.

The hull plating should be 21-pound on the bottom; bilges should be 21-pound; the side plating may be of 18-pound plate and in not more than 2 streaks.

The deck should have a checkered stringer streak on each side 30″ wide and about 7/16″ thick; remaining deck may be of 15-pound plating.

All plating to be worked "in" and "out" on longitudinal streaks; longitudinal laps to be double-riveted. All girth seams to be double-riveted to butt straps.

There should be a nosing or fender streak of 8″ x 8″ yellow pine, supported by 4″ x 4″ x 3/8″ angles top and bottom. This nosing should extend entirely about the barge. On each side of the full length there should be a second fender streak of the same section about 3′ below the deck.

sion in Washington, accompanied by a letter dated June 26, 1906. Therein, among other things, Mr. Maltby said: "It is noted that the drawing submitted by the Ellicott Machine Works does not show any detail, as required by the specifications. It is assumed, however (and we should insist on it), that the framing will be in strict accordance with our specifications." A sketch was inclosed "showing the desired arrangement of the hinges on the hopper doors and the method of securing timber lining to hoppers," and various suggestions were made explanatory of the details shown on this sketch. Thereupon D. W. Ross, purchasing officer, prepared and transmitted to the Ellicott firm a draft of contract for the construction and delivery of the barges, but it was returned with the suggestion that article 1 thereof be rewritten, so as to provide for the construction of—

"six steel dump barges in accordance with specifications contained in Circular No. 310–C of the Isthmian Canal Commission, dated May 29th, 1906; with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and subject to such amendments as to details of hinges, hoisting gear and method of securing timber lining to hoppers, as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract."

In the letter returning said draft of contract, it was stated that—

"our drawing No. 2105 was not intended to show working details, but solely to limit the conditions of displacements, load, and draft. As long as these are maintained we shall be pleased to follow such reasonable design of working details in arrangement and distribution of material as Mr. Maltby or his inspector may require."

Claimant also, at the request of said Ross, addressed

a letter, dated July 27, 1906, to Maltby, in which it submitted—

"print # 2105 revised July 27th, specifying details as called for in your letter June 26th, 1906, of hinges, hoisting gear and method of securing timber lining to hoppers."

In said letter, this statement also was made:

"We have also inserted on the drawing a schedule of displacement, load and draft showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire."

The alleged contract, the subject of this controversy, was then executed, F. P. Shonts, chairman of the Commission, signing for the party of the first part. Following a recital that "the Isthmian Canal Commission, for and on behalf of the United States of America and the said Ellicott Machine Company, had covenanted and agreed, to and with each other, as follows." The first article of the contract was inserted, reading as follows:

"Article 1. That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310–C of the Isthmian Canal Commission, dated May 29th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch are attached hereto and form a part of this contract."

It was provided in article 3 as follows:

"Article 3. That the party of the first part, by its duly authorized agent, shall have the right to inspect at any time during the process of construction of these barges, any and all material and workmanship used, or to be used, in said construction, and such inspection of said barges, and of the material used, or to be used, in the construction thereof, and of the workmanship thereon, may be made by the party of the first part, or its duly authorized agent, at any place where said materials may be found, and at the places of construction of said barges. In addition to the above, when said barges, or either of them, are pronounced by the party of the second part to be completed and ready for final inspection, such inspection may be made by the party of the first part, by its duly authorized agent, at the place or places where such barges, or either of them, have been constructed, such inspection being for the purpose of determining whether the same, or either of them, meet the requirements set forth in the letters, specifications, and blue print mentioned in article 1 hereof and all of said inspections, whether preliminary or final, the party of the first part, by its duly authorized agent, shall have the right to reject any and all material used, or to be used, in the construction of said barges, or either of them, or in the workmanship thereon, when, in the judgment of the party of the first part, by its duly authorized agent, the same or any part thereof, does not conform to the requirements above mentioned."

In article 8, among other things it was provided as follows:

"The barges herein contracted for shall be completed in accordance with the specifications, letter, and blue print annexed hereto and made a part hereof, . . ."

By article 9 it was agreed that payment would be made of the stipulated price for the six barges "upon their construction and delivery in accordance with the terms of this contract and the papers attached hereto."

It was provided in the last article of the contract as follows:

"Article 12. If, at any time, during the prosecution of this work, it shall be found advantageous or necessary to make any change or modification in said barges, or either of them, and this change or modification should involve such alteration in the specifications as to character, quantity, and quality, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices both of material and labor thus substituted for those specified in the original contract, and before taking effect must be approved by the chairman of the Isthmian Canal Commission: Provided, That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligations arising from such modification was incurred."

Two days after the execution of the contract claimants presented to the Government inspector of dredges a list of materials intended to be used by them in the construction of said barges, but upon examination of said list it was found by said inspector of dredges that the dredges which the claimants proposed to construct were different from those described in circular letter and specifications 310–C, set forth in the petition, the principal component parts or members being reduced in weight, size and power of resistance, and thereupon the same was disapproved by the officers of the Government. Demand was thereupon made that the claimants should adhere to the original specifications, which they refused to do, and as a result, the United States abrogated the contract.

Soon afterwards this suit was commenced. By the petition judgment for thirty thousand dollars was de-

manded as the "gains and profits, which claimants would have made had they constructed the barges in accordance with the contract as the terms of that instrument were construed by the contracting firm." The Court of Claims, as already stated, gave judgment against the United States for the sum of ten thousand dollars. There is no statement in the findings as to the loss sustained by the claimants. Evidently, however, the conclusion to award the sum stated was based upon the hypothesis mentioned in the closing paragraph of the opinion of the court below, reading as follows:

"In consideration of all of the facts in the case, and in view of the difference between the cost of doing certain work and what claimants were to receive for it, making reasonable deduction of the less time engaged and release from the care, cost, risk, and responsibility attending a full execution of the contract, the court decides that claimants are entitled to recover as profits the sum of $10,000, and accordingly judgment against the defendants for said amount is hereby ordered."

A motion to dismiss the appeal first requires attention. The facts are as follows:

The judgment against the United States was entered on May 18, 1908. Eighty-four days afterwards, on August 10, 1908, defendant filed a motion for a new trial. This motion was argued and submitted on November 23, 1908, and was overruled on January 4, 1909, in the term which began on December 7, 1908. Seventeen days afterwards, on January 21, 1909, the United States filed a motion to amend the findings of fact; on February 8, 1909, the motion was argued and submitted; and on February 15, 1909, the motion was overruled in part and allowed in part. Ten days afterwards, on February 25, 1909, the United States made application for and gave notice of an appeal "from the judgment rendered in the above entitled cause on the fourth day of January, 1909."

The grounds for the motion to dismiss are these: (*a*) that the appeal was not taken within ninety days after judgment, (Rev. Stat., § 708), and (*b*) that the appeal prayed for and allowed was not from the judgment of January 4, 1909, "but was merely from the order overruling the motion for a new trial."

The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgments or decrees of the Court of Claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition. *Kingman* v. *Western Manufacturing Company*, 170 U. S. 675, 680, 681. It is, we think, also manifest that the appeal was taken upon the hypothesis just stated that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed of. *Texas & Pacific Railway Company* v. *Murphy*, 111 U. S. 488.

Coming to the merits. The claimant in effect reiterates in the argument at bar the position taken by the court below in the opinions by it rendered, reported in 45 Ct. Cl. 469 and 44 Ct. Cl. 127. We shall, therefore, dispose of the case by reviewing the opinions of the court below.

In the opinion delivered upon the original hearing it was observed that "the litigation in this case resulted from what seems to have been an apparent misunderstanding by the agents of the defendants, as to certain changes in the terms of an original advertisement for bids for the construction of the said six steel dump barges of a specified size, strength, and weight," etc. It was, however, held that the contract was clear and unambiguous in terms, and that the evidence revealed " a degree of negli-

fications, letter and blue print annexed hereto and made a part hereof. . . ." So, also, in article 9, payment is to be made only when the barges have been constructed and delivered "in accordance with the terms of this contract and the papers attached hereto," of which papers the specifications formed a part. Article 12 also clearly negates the conception that it could have been intended by the parties that material parts of the specifications should be treated as not forming a portion of the contract, although declared by its terms to be a part thereof, since the binding efficacy of the specifications as to material is therein emphasized. The article, in substance, provided that no change or modification "involving an alteration in the specifications as to character, quantity and quality, whether of labor or material, as would either increase or diminish the cost of the work" should be made unless "agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, *and giving clearly the quantities and price both of material and labor thus substituted for those specified in the original contract*," *etc.* Manifestly, this article was drawn upon the conception, not that the contract did not, but that it did, specifically provide as to what material should be furnished for the work, and no other source could be resorted to for light as to the material contracted to be supplied than the specifications which it is now urged ought by construction to be removed from the contract.

Thus viewing the contract as a whole and determining that the specifications so far as the "Framing" schedule is concerned should have been treated as unaffected by the provisions of article 1, it is evident that there was a conflict so irreconcilable between essential provisions of the assumed contract as to render it impossible to enforce it as an agreement between the parties. This result of the absolutely antagonistic and destructive character of essential provisions of the contract, one upon the other, can

only be escaped by indulging in one of two hypotheses, either that the terms of the advertisement and specifications as incorporated in the assumed contract overshadowed and virtually destroyed the proposals resulting from the bid of the claimant, which also was incorporated in the contract, or conversely that the proposals which the bid embraced had the effect of setting at naught the provisions of the specifications. But if the first assumption were indulged in, it would clearly result that there was no right to recover, since that right is based upon the theory that the specifications are not binding and need not be complied with; and if the second were indulged, the same result would follow, since it would then come to pass that the contract was so irresponsive to and destructive of the advertised proposals as to nullify them, and therefore cause it to result that the contract was one made without the competitive bidding which was necessary to give it validity.

Under the circumstances, therefore, the court erred in treating the contract as a valid agreement and in awarding judgment against the United States.

Judgment reversed.